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IN THE

Supreme Court of the United States

October Term, 1958

TAORMINA CORPORATION, ET AL,

Petitioners

vs.

ANTONIO ESCOBEDO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners pray that Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to revie wthat Court's judgment entered in this cause on April 8, 1958.

Opinions Below

The two memorandum opinions of the District Court (R. 65 and R. 467) are unreported.

The opinion of the Court of Appeals, included in the record (R. 527) and in this petition as an

appendix, is reported in 254 Federal Reporter, Second Series, at page 171.

Jurisdiction

The judgment of the Court of Appeals was entered on April 8, 1958 (R. 535). Petition for rehearing was denied on May 16, 1958 (R. 581). The jurisdiction of this Court is invoked under Article 1254(1) of Title 28, United States Code.

Questions Presented

This is a "Master and Servant" case involving a farmer-employer and a farm-employee. Generally, as indicated by the Court of Appeals, the controlling questions were of two classes, one relating to the parties and limitation and the other relating to liability. In relation to both of those matters, there appears substantial error that is reviewable by this Honorable Court. This Court is petitioned, therefore, for consideration and review of errors in connection with both these matters.

Regarding the first or the parties and limitation, the ultimate question is whether the partnership, named as a defendant for the first time in a Second Amended Complaint which was filed more than two months after the expiration of the limitation period provided by state statute, can be held as a Defendant and adjudged liable on the basis of the rule of "relation back" of amendments, this being inconsistent with authoritative State decisions as well as

with decisions of the Supreme Court of the United States and other Federal authority. Has the Court of Appeals recognized and followed the correct rule of decision under the doctrine of *Erie v. Tompkins* in the application of the state statute of limitation? Is not the holding of the Court of Appeals regarding the joining of a new party after limitation inconsistent with previous decisions of this Supreme Court of the United States, as well as other Federal authority?

Regarding liability, the questions are compelling and even fundamental, and they are based upon rules and principles applicable to "Master and Servant" cases *that have been firmly and abundantly established in the law of Texas*, as well as in decisions of this and other Federal Courts. The first question, then, is whether those rules and principles constitute the proper basis upon which the present case should be decided—whether they constitute the correct rule of decision in the case under the *Erie v. Tompkins* doctrine. Has the Court of Appeals rendered substantially the same decision as would have been rendered by State Courts on the basis of controlling and undisputed facts?

And more specific questions, virtually containing their own answers, arise from the rules and principles established as law in Texas and applicable to "Master and Servant' cases. Does not the admitted knowledge of the servant of any obvious or plainly observable defects in the equipment used and his knowledge of danger in the situation at the time of the accident recognized in this case by the Court

of Appeals) preclude any liability of the master as a matter of law? Since the consequences of the situation should have been foreseen by a prudent man (as stated by the Court of Appeals), should not the matter of foreseeability be considered and applied, fairly and impartially, to the position of both of the parties and to the defenses of contributory negligence and assumed risk? When the servant has knowledge of the situation and of danger together with a duty to foresee, does not an accident resulting from his proceeding *while entirely alone* bespeak contributory negligence as a matter of law?

In any event, when the defense of Assumed Risk is properly plead, presented, assigned and urged in the Courts below—and its very basis is recognized and sustained by the Court of Appeals—does not a correct determination of the case require from the Federal Court a consideration and notice of that defense consistent with the decisions of the State in which the case arises? Should not the Federal Court follow applicable state court decisions in "Master and Servant" cases rather than purportedly turning its decision on clearly inapplicable authorities not cited nor relied upon by either party?

These are the more salient questions. It is understood that detailed or subsidiary questions are deemed to be included in a consideration of the petition.

Statutes and Rules Involved

Of the matters presented, the first—the parties and limitation—involves the applicable Texas stat-

ute of limitation which is Article 5526, Revised Civil Statutes of Texas and which, as applicable here, provides:

> "*There shall be commenced and prosecuted* within two years after the cause of action shall have accrued, *and not afterward*, all actions or suits in court of the following description:
> 6. Action for injury done to the person of another."
> (Emphasis added)

That matter also involves the Texas statute and the Federal Rule of Civil Procedure, similar in their provisions, pertaining to the relation back of amendments of pleading filed after limitation. The statute, Article 5539b, Revised Civil Statutes of Texas, as amended, provides as follows:

> "Whenever any pleading is filed by any party to suit embracing any cause of action, cross-action, counterclaim, or defense, and at the time of filing such pleading such cause of action, cross-action, counterclaim, or defense is not subject to a plea of limitation, no subsequent amendment or supplement *changing any of the facts or grounds of liability or of defense shall be subject to a plea of limitation*, provided such amendment or supplement is not wholly based upon and grows out of *a new, distinct or different transaction and occurrence*." (Emphasis added)

The Federal Rule of Civil Procedure — Rule 15(c) — provides:

> "Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original pleading."

Another rule that may be noticed in connection with the Court of Appeals' ruling as to limitations is Rule 28 of the Texas Rules of Civil Procedure, pertaining to suit against a partnership, which provides:

> "A partnership or other unincorporated association, or an individual doing business under an assumed name, may sue or be sued in the partnership, assumed or common name for the purpose of enforcing for or against it a substantive right."

In both of the matters of limitation and of liability the Federal "rule of decision" statute is involved along with the *Erie v. Tompkins doctrine*. Its provisions are familiar to this Court (28 U.S.C. Section 1652):

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Regarding the matter of liability, it is here emphasized as substantially significant that there are no statutory provisions involved. Particularly, there

is none pertaining to the master and servant relation of the parties here. While Texas has a workmen's compensation law, farmer-employers and agricultural workers are excepted from it. Thus, this case is not affected by any statutory provisions pertaining to employer's liability or to the common law defenses of contributory negligence and assumed risk.

The decision of this case should be governed by the law of Texas as it has been pronounced by Texas Courts, and the defenses of Assumed Risk and Contributory Negligence are neither to be qualified nor disregarded.

Statement of the Case

Parties and Limitation

This action, based on an accident that occurred on May 17, 1952, was filed on May 3, 1954 (R. 11) against the originally named defendants Taormina Corporation, a Texas corporation, E. A. Taormina, A. F. Taormina and Frank Cullichia. Federal jurisdiction was based on diversity of citizenship.

The suit was filed only two weeks before the two year period of limitation under the state statute would have barred it completely on May 16, 1954. And it will be significant that the time for the originally named efendants' answering the summons (twenty days or May 23, 1954) was beyond the limitation period. Before answer, however, the first of two Amended Complaints was filed on May 15, 1954 (R. p. 19), and additional parties were named.

But the Petitioner, Taormina Company, a partnership, was not then joined or made a defendant in the case, nor were the individuals that were named in the first amendment designated as "partners" or sued as such.

That was not done until July 26, 1954, *more than two months after the expiration of the limitation period*, when the Second Amended Complaint was filed (R. p. 39) and there were named as Defendants *for the first time* the partnership and ten individuals as members of the partnership. Thereupon, motions to dismiss as to these Defendants were filed (R. p. 53) and answered (R. p. 57).

The District Court then entered an *interlocutory* memorandum dismissing seven of the ten individuals named as members of the partnership but holding the partnership and carrying the motions along with the case. This was done on the basis of *unproved allegations* of the Respondent here (R. 73) and a finding that three individuals originally sued were partners. But until the filing of the Second Amended Complaint they had not been designated as partners and the partnership had not been named.

After trial, the motions were renewed and overruled (R. p. 468).

Error was assigned to that ruling in the Court of Appeals and that Court, while quoting the rule that an amendment *adding or substituting a new party* "cannot be allowed after the statute of limitation has expired," has held, nevertheless, that some kind of "notice of suit" (not summons or service) was sufficient to hold the entity, named and joined for

the first time after limitation, on the basis of the rule of "relation back" of amendments (R. pp. 531-533; App. pp. 5-6).

In its holdings that the Petitioners "were properly made Defendants by the amendment" (R. 532), and that the Second Amended Complaint—adding *a new party* after the limitation period—"related back to the time of the filing of the complaint under the law of Texas as well as under Federal law" (R. 533) the Honorable Court of Appeals was in error in that, first, it has held in effect that the present questions as to limitations and parties are not within the doctrine of *Erie v. Tompkins*—that the matter is controlled by a Federal rule of procedure, not by the state statute and applicable decisions of Texas Courts; and second, after noticing the Petitioner's position and stating that the amendment related back "under Texas law," it has failed to follow the more authoritative and applicable decisions (decided or approved by the Supreme Court of Texas) while citing an inapplicable case.

For the first holding mentioned—that the Petitioner was properly joined as a Defendant—the Court of Appeals has cited and quoted from the case of *Gifford v. Wichita Falls & Southern Railway*,[1] decided previously by the same court. That case was *admittedly* in conflict with decisions of Texas Courts involving some of the same entities and in the Court's opinion it was expressly stated that it

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[1] *Gifford v. Wichita Falls & Southern Railway Company*, (CAA-5th) 224 Fed. 2nd 374

was not controlled by *Erie v. Tompkins*, but was a procedural matter governed by the Federal Rules of Procedure. In the Petitioners' view, there was a substantial distinguishing factor in the *Gifford* case in that the matter of parties was not raised until after an appeal and remand and that may have rendered Texas decisions inapplicable there. But be that as it may, from the Court's quotation and citation of that case in the present one and its holding here in consonance with it, that Rule 15(c) permitted joinder of a new party after limitation, it is clear that the particular rulings in the *Gifford* case have been incorporated or adopted here.

Thus, the Court's holding is effective to rule that the present questions are not controlled by the doctrine of *Erie v. Tompkins* and that they are governed by Federal rule and not by state statute and decision.

It is the position of the Petitioners that the pronouncements of this Supreme Court subsequent to *Erie v. Tompkins* have broadened the doctrine of that case and it is controlling in the questions here presented.

It is also their position that—while amendment strictly within the *specific terms of the Rule* may be allowed liberally—the Rule was not intended to be applied to permit the joinder of a new party or entity after limitations, nor in such a manner as to by-pass and render ineffective the state statute of limitation. This has been held or decided by numerous Federal Courts and the only cases found to the contrary are the *Gifford* case, supra, and the present one.

For the other holding of the Court of Appeals mentioned above—that the amendment joining new parties related back to the filing of suit under the law of Texas—the Court has cited a case inapplicable on the facts and law.

The law of Texas does not permit the joinder of new and additional parties (or entities) by amendment after the limitation period, if that is challenged as it was in the present case. This is settled by authoritative Texas decisions. The one Texas case cited by the Court of Appeals was decided on a substantially different basis. Applicable and more authoritative cases are controlling of the question here. One of them is decisive even of details in the present case, such as disclosure by Defendants. These were cited but were not noticed or given effect by the Court of Appeals.

It is the Petitioners' position that the Court of Appeals did not follow the Texas law, that its decision is also in conflict with other Federal authority, and that it did not decide the questions under the doctrine of *Erie v. Tompkins*.

Liability

Through the progress of this case from its original filing to the present, there has been a constant change of emphasis in the basis of the Petitioners' negligence claimed by Respondent or found by the Courts below. In the Original and First

Amended Complaints five grounds of negligence[2] were charged (R. 14-15 and R. 24-25) and in the Second Amendment those were increased to eight (R. 48-49).[3] Requested trial amendment (R. 115) and the Trial Court's finding (R. 471) enlarged the number to nine and included the matter of warnings and instructions. And the Court of Appeals has now apparently based its decision of liability on still another basis of imposing on the Petitioner an unequal burden of "great care" in the situation—and this, even though it was outside of the contentions of the parties, and the servant had knowledge and was alone at the time of the accident.

Indeed, it would appear that as the Petitioner—on the basis of firmly settled rules of law—has met and refuted the original claims indicated by pleading and pretrial, and has demonstrated the fallacy of specific findings, the case has still been decided for Respondent on the basis of new findings or theories unequal in their application and contradictory in the Courts below. For example, the Trial Court recognized the defense of assumed risk as one of "the most serious questions" (R. 172) but found

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[2] These briefly stated included (1) the furnishing of a lantern, (2) the furnishing of a defective pump, (3) the alleged ordering him to refuel while the motor was running, (4) failing to provide a fellow worker, and (5) failing to provide a permanent connection between the storage tank or requiring the use of a hand pump.

[3] There were added three grounds claiming further negligence in (6) failing to inspect the pump, (7) failing to provide a safe place to work; and (8) failing to provide safe equipment.

that "an ordinarily prudent man" would not have appreciated any danger, while the Court of Appeals has held that knowledge of danger could be imputed to Respondent (R. 533), but has entirely ignored the defense of assumed risk.

Contending only for equality and impartiality in the application of the law to both parties, the Petitioner has taken the position that whether the situation was fraught with danger and whether injury was foreseeable or not, the result would be the same. If it were not, the Petitioner was not negligent; and if it were, then the Respondent assumed the risk or was contributorily negligent.

Other specifically controlling contentions of the Petitioner—also based on firmly settled rules of law and admitted facts—have not been properly noticed by the Courts below. It is settled that knowledge of the servant of a claimed defect in the equipment he was using will generally preclude any finding of negligence and in the present case, such knowledge was admitted and recognized by the Trial Court. (See below.) A pump of the kind used by Respondent at the time of the accident has been held by a Texas Court to be a simple tool or device, even in the case of *Nesmith v. Magnolia Petroleum Company*[4] which was cited by the Court of Appeals but followed only in the one particular matter of the danger of gasoline. But the authorities will be specifically cited and noticed in the argument below.

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[4] *Nesmith v. Magnolia Petroleum Company*, (Tex. Civ. App.) 82 S.W. 2d 721

Here, some aspects of the case and the contentions have been noticed in preface to the factual situation pertaining to the matters of negligence and the affirmative defenses.

There are two substantial and material omissions of controlling and undisputed facts in the summary of the factual situation included in the opinion of the Court of Appeals. The first is that the Respondent was a mechanic having knowledge of gasoline and motors (see below) and the second is that the clamp on the pump was not only missing "on the night in question" (as stated by the Court) but was also missing in the afternoon when Respondent used it and *that fact was consistently admitted by* Respondent in deposition, in trial, and in answer to direct question by the Trial Court. (R. 132, 133 and 137).

The accident in question occurred on May 17, 1952, at about 11 or 12 at night. The Respondent had been employed as a farm laborer by the Petitioner Taormina Company, a partnership, about a month before the occurrence and during that time had done various kinds of work on the company's farm. In the general use of tractors about the farm, the Respondent had had some work in connection with them or in refueling them.

In the operation that is involved in the accident in question, the tractor was serving as a stationary engine to furnish power for propelling an irrigation pump. The tractor was connected to the irrigation pump, which was situated some feet away from it, by means of a belt. A barrel of gasoline was located

near the tractor, and in the barrel there was a hand pump with a hose approximately eight feet long attached to it. In carrying on the irrigation work, it was necessary to assign some one to attend to the pump and tractor and his duties included the filling of the tractor with gasoline when its supply was low. Only one man was assigned to the job of attending the tractor and pump.

After lunch on the date of the accident, the Respondent was asked by the foreman if he "wanted to go and take charge of the pump and also attend the tractor" (R. p. 139). Later in the afternoon at about 5 o'clock the Respondent filled the tractor with gasoline using the equipment mentioned. At that time, he was alone. After filling the tractor with gasoline, he went to a ranch store and saw the foreman, Cavazos, and procured his pay and then returned to his work.

The testimony of Respondent, Antonio Escobedo, is the most important relating to the question of liability, negligence and proximate cause. This for the reason that he alone knew of the specific circumstances attending the accident resulting in his injury and also he alone could testify on the matters of his experience and background and the nature of his employment and his prior use of the equipment involved in the accident. From a thorough and careful consideration of all of his testimony, salient and controlling facts emerge.

There can be no question but that the Respondent is to be charged with at least as much knowledge in regard to the use of the equipment and the filling

of the tank of a tractor with gasoline as would be charged to an ordinarily prudent person, and in fact, in the case at bar, he should be charged with even more because of his background and experience. Respondent is a man of thirty-six (36) years of age and is a citizen of Mexico.[3] He had worked in California on the railroad and had used power machines that were operated with air and in Washington and in Montana had operated tractors (R. p. 128 and 177). His testimony was that in Mexico he had been a mechanic's helper in a garage, and there he worked on automobiles and trucks (R. p. 128) which necessitated the use of gasoline. He was experienced with gasoline motors (R. p. 129). In fact, in his cause of action the Respondent relied upon a claim, included in his second amended complaint, that "he had had experience and training as a mechanic and if he had been able to carry out his plan of obtaining permission to legally enter the United States, he could have at least tripled or quadrupled his

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[3] In connection with this statement, it is noted that the direct testimony of Antonio Escobedo, the Respondent, was not included in the record. It was requested to be so included and was omitted probably through inadvertence. In any event in the direct testimony the following appears in the original transcript (on p. 16):

"Q. How old are you?

A. I am 36 years of age.

Q. Of what country are you a citizen?

A. Mexico."

As to the other matters pertaining to the Respondent and his experience; the omission of the direct testimony is of no significance because the cross-examination beginning on page 126 of the printed record includes most of the important matters.

wages,"[6] and these admissions were introduced as such into the evidence and were admitted by the Court (R. p. 186). There is also testimony by the Respondent that he was a mechanic by trade, that he had done repair work on pumps and carburetors, and that he had operated tractors and had done simple repair work on tractors "such as carburetor work and things like that," and he had worked on automobiles and trucks (R. p. 181).

The Respondent had used the same gasoline pump in filling the tank of the same tractor that was involved in the accident, and had performed the same operation in the afternoon, a few hours before the accident. On direct testimony (which is not in the printed record but is set forth in the margin)[7] the Respondent testified that he had used this pump in the afternoon of the accident and that at that at that time it did not have the metal clamp on it or

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[6] See last sentence, paragraph 8, Second Amended Complaint, R. p. 49; see also last sentence, First Amended Complaint, paragraph 6, R. p. 26; see also last sentence, paragraph 5, Original Complaint, R. p. 16.

[7] In the original transcript of the evidence which was filed with the Clerk of the Court of Appeals, the following testimony appears on pages 30-31:

"Q. Did you have occasion to use this pump during the daytime?

A. Once.

Q. Once when?

A. In the afternoon.

Q. What afternoon?

A. The afternoon of the accident.

Q. When you saw it, did it have this metal piece?

A. I don't believe it had one because it came loose."

hat he did not "believe it had one because it came loose." The prior use of the pump by the Respondent is repeated in the testimony on direct examination.[8] It was repeated again on cross-examination where the Respondent again testified that he had used the same pump earlier in the day, in the afternoon, at about 5 o'clock (R. 130). The same testimony appears later when parts of the Respondent's deposition had been introduced (R. 179-180).

The ring or band or the so-called metal clamp was not on the pump when used in the afternoon (R. p. 132 and 133). The Trial Court once interrupted the testimony apparently to make certain that *the Respondent had noticed the condition of the pump in the afternoon* (R. p. 137) and the Court in his findings felt compelled to accept the Respondent's statement "that he noticed the fact that there was not a clamp on the hose that afternoon" (R. p. 473).

After the Respondent had used and observed the pump in the afternoon, he said nothing to anyone concerning any defect in it or its needing any repair. The Respondent understood that if anything went wrong with the pump or equipment he was using, he was to notify the foreman Cavazos (R. p.

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[8] The testimony in that connection was (on p. 32) as follows:

"Q. Now you say you fueled the tractor with this pump during the afternoon?

A. I don't know whether that's the pump.

Q. About what time?

A. About 5 o'clock more or less."

144). When he went to the store in the afternoon to get his pay, he saw the foreman Cavazos, but did not say anything to him concerning the equipment he was using or the gasoline pump or the connection on it (R. p. 130).

It is abundantly clear in the record that the Respondent was of the opinion that the pump was in a good condition (R. p. 143, 144, 179, 183, 185 and 186).

On returning from the store after he had seen the foreman Cavazos, the Respondent went to the barn and chose a lantern from some four or five that were there for the use of the workmen (R. p. 138). The lantern was in evidence and was of the same kind used generally in the locality for farm work. There was nothing wrong with the lantern (R. p. 138). While, according to the Respondent, the lantern will give light for a distance of about twelve feet (R. p. 190) the Respondent placed the same on the ground less than three feet (R. p. 161-162 and 181-182) from the barrel of gasoline.

After the location of the lantern, the Respondent commenced the operation of turning the pump handle to pump the gasoline, and it was in that operation that the accident occurred. In the Respondent's testimony (R. p. 135, 316, 180, 181, 192, 493) there is considerable confusion about the exact operation and the dripping of gasoline from the hose prior to the time that the hose slipped off and fell on the lantern. The particular location of the lantern in close proximity to the gasoline when that was not necessary would appear to be as much an

effective cause of the accident as the falling of the hose.

Moreover, the Court of Appeals has expressly stated that at the time of the accident the Respondent was "operating the pump with one hand and *holding the hose with the other.*" How then, if Respondent was holding the hose and let it slip, can the Petitioner be found negligent; and even if there were remote or passive negligence wherein could that be held the effective cause of the accident when Respondent knew of the claimed defect and attempted to avoid the falling of the hose by holding it?

In short, if the several matters in the case at bar involving the Respondent's operation at the time of the accident were resolved from their legal concepts and terminology to a common understanding and parlance, the gist of the matter would be that a mature man with some experience as a mechanic may not hold someone else responsible for injuries received by him while he was alone and engaged in the relatively common and simple operation of filling a gasoline tank even at night with a lantern, if he had knowledge of the properties of gasoline and the Court of Appeals has recognized that he did as a matter of law — then he should not have placed the lantern so close when admittedly it would have served just as well at a greater and safe distance. This has been held authoritatively to constitute contributory negligence as a matter of law (See below).

The several other matters charged as negligence such as the place of work, the providing a fellow

worker, and the giving of warnings or instructions were not, under applicable rules and admitted facts, substantially in issue nor material in the case.

Nevertheless, the Trial Court found the Petitioner negligent on four of the nine specific matters charged and stated (R. 47) as follows:

> "I find that they were negligent in one or all of the following respects: (a) providing plaintiff with the defective equipment and pump, which defect was known to Cavezos, the foreman; (b) in failing to provide plaintiff with a safe place to work; (c) in failing to give him adequate warnings and instructions; and (d) in failing to provide plaintiff with a fellow worker to assist in the operation. I further find that each or all of the foregoing negligent acts were the proximate cause of plaintiff's injuries." (Emphasis added)

After those findings the Trial Court disposed of "the most serious questions" of Assumed Risk and Contributory Negligence (R. 172-173). No particular findings were made as to Contributory negligence. As to assumed risk the Trial Court, after recognizing the settled rule that knowledge of the servant, actual or imputed, of a defect in the equipment would preclude recovery, held that "an ordinarily prudent person" would not have appreciated any danger.

Thus, there was an obvious contrariety in the Trial Court's holding in that if Respondent could not appreciate any danger in the situation, the Petitioner could not foresee any injury and hence

could not be negligent; or if Petitioner could foresee injury—essential to holding it negligent—then the Respondent, or any prudent person, should have also appreciated it.

To that holding of the Trial Court as to assumed risk (as well as to other findings) error was assigned in the Court of Appeals; and that Court has circumvented the cogency of Petitioner's contention for an equal and impartial application of the rule of foreseeability of injury through erroneously attempting to impose on the Petitioner a greater burden of care than that with which the settled law charges the employer. That was done on the basis of ferreting out a very old and inapplicable case that was not cited nor relied on by either party, that did not involve the same relationship of parties, and that was decided on a substantially different and inapplicable basis to the controlling matters here.

Regarding the assignments as to other Trial Court findings, the Court of Appeals has said nothing in the opinion except to observe that the findings were made and that negligence, primary or contributory, is ordinarily a question of fact. But that was not the question.

The assignments were based on the effect of admitted and undisputed facts under established rules of law.

Primary negligence was precluded as a matter of law because of the admitted and undisputed knowledge of the Respondent of the condition of the equipment and the situation prior to and at the time of the accident.

And Contributory Negligence was assigned and established as a matter of law. Indeed, the Court of Appeals has sustained the very basis of that defense in its holding that knowledge of the dangerous properties of gasoline can be imputed to Respondent as well as to the Petitioner. The Petitioner contended that this would obtain regardless of the Respondent's attempt to change an admission of knowledge of danger made in his deposition. And several cases sustaining it, even by the same Court of Appeals, were cited.

But the Court of Appeals turned its holding of liability upon statements to the effect that, while Respondent had knowledge of dangerous properties of gasoline, while a prudent man would foresee danger or injury from having a lantern near gasoline, and while Respondent was a mature man and was alone at the time of the accident, nevertheless, the Petitioner alone was negligent and was liable.

It is not deemed necessary or proper here to discuss tenuously the particular statements and words used by the Court of Appeals, nor to discuss the specific assignments and arguments in that Court. There is being filed in this Court with the record a copy of the Appellants' brief in the Court of Appeals. It is long because of the nature of the case and the number of matters that it was necessary to notice. However, it is available to this Court with the record if the Court desires to examine the assignments, issues, and arguments themselves.

The essence of the holding of the Court of Ap-

peals as to liability was embraced in the following from its opinion (App. p. 7—R. 533):

> "Gasoline is volatile, inflammable and explosive. The knowledge that it has these properties is so general that it can be imputed to the appellee as well as to the appellants. *Nesmith v. Magnolia Co.*, Tex. Civ. App., 82 S.W. 2d 721. The nature of the substance is such that a person who has control over it must exercise great care to prevent an injury which a prudent man would foresee. *Waters-Pierce Oil Co. v. Snell*, 17 Tex. Civ. App., 413, 106 S.W. 170. The transfer in the night time of gasoline with a defective pump by the light of an open flame was certainly an event from which it could be anticipated that an injury might result. The consequences of such conduct should have been foreseen. 30-B Tex. Jur. 218 et seq., Negligence §§ 41-43. This is no less so because the same acts had been previously done without injury resulting. *Waters-Pierce Oil Co. v. Snell*, supra. The appellee successfully contended that his injuries were caused by the negligence of the appellants.

It is apparent from the above that the Court of Appeals has charged the Petitioner with "control" over the situation and "great care." The person who had control over the situation at the time of the accident was Respondent. He was alone and his control was exclusive. The case cited by the Court for its statement involved a company regularly engaged in the marketing of gasoline and petroleum products and an accident that occurred at its ware-

house. It had nothing whatever to do with a farmer-employer using gasoline on the farm as is a present day general custom. And the Court cited, *but did not follow*, a more applicable case involving similar facts and the kind of equipment as the present one.

In short, the decision of the Court of Appeals on the question of liability is erroneously in conflict with the settled law of Texas as well as that of Federal decision. The Court should have given effect to the two legally conclusive matters in the case which were Respondent's knowledge and the matter of an equal application of the rule of foreseeability. It should have followed Texas decisions (including one cited by the Court) as to the nature of the equipment involved and its effect upon the question of liability. It should have noticed and considered the defense of assumed risk. And, as a matter of law, it should have given effect to the defense of contributory negligence after sustaining the basis for it.

Its failure to properly follow the law of Texas and to render a decision in accord with the settled rules mentioned should be reviewed by this Honorable Court for reasons given below.

Specification of Errors

As to the matter of the parties and limitations, the Court of Appeals erred:

1. In failing to correctly ascertain and apply the correct rule of decision under the applicable Federal statute and the doctrine of *Erie v. Tompkins*.

2. In failing to correctly ascertain and follow

the law of Texas pertaining to the joining of a new party after the period of limitation has expired.

3. In applying the provisions of Rule 15(c) of the Federal Rules of Procedure, inconsistently with the decisions of other Federal Courts, so as to permit the joinder of a party or entity after the expiration of the limitation period under the State statute.

As to the question of liability, the Court of Appeals erred:

1. In failing to correctly ascertain and apply the law of Texas applicable to the "Master and Servant" relationship in the present case which is not affected by any statute, Federal or State.

2. In failing to decide the question of liability in accord with previous decisions of this and other Federal Courts.

3. In failing to give proper legal effect to the admitted and undisputed knowledge of the servant of the situation at the time of the accident in question.

4. In failing to apply the rule of foreseeability equally and impartially.

5. In failing to give any notice or effect to the defense of Assumed Risk, which was sustainable on the undisputed facts included in the opinion of the Court of Appeals.

6. In failing to sustain the defense of Contributory Negligence as a matter of law after expressly finding the basis for it.

7. In basing its decision on a matter not presented or argued by either of the litigants which was outside of the issues and theory upon which

the case was tried, and as well outside of the Trial Court's finding and judgment from which the appeal was taken.

Reasons for Granting the Writ

As To Parties and Limitation

As to the question of the parties and limitation as it is involved in the present case, the Petitioner submits three reasons why this Honorable Court should grant this Petition. First, as indicated in the Specification of Errors, it is apparent that the Court of Appeals did not follow the correct rule of decision under the applicable Federal statute and the doctrine of *Erie v. Tompkins*. Second, in such passing notice as was given by the Court of Appeals to the applicability of the State statute of limitations, the Court of Appeals has not correctly understood and followed the law of Texas which does not permit the joining of a new party after the expiration of the limitation period. And third, in any event, the Court of Appeals has incorrectly applied the provision of Rule 15(c) of the Federal Rules of Civil Procedure to permit the joinder of a new party after limitation inconsistently with the decisions of this Court, as well as other Federal courts and State courts.

That this question comes within the purview of the *Erie v. Tompkins* doctrine and is to be decided in conformity with the law of Texas as established by its Courts appears to be settled by decisions of

this Supreme Court of the United States.[9] Nevertheless, the Court of Appeals has, in effect, held that it is not. The essential part of the holding of the Court of Appeals—that the Respondent was entitled to the benefits of Rule 15(c)—was based upon a prior decision of the same Court in the case of *Gifford v. Wichita Falls and Southern Railway Company*,[10] and that case was admittedly in conflict with decisions of Texas courts, and it was expressly held that it was not controlled by the decision of Texas courts, nor governed by *Erie v. Tompkins*.[11] Thus, it

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[9] *Byrd v. Blue Ridge Rural Elec. Coop.*, 2 L. Ed. 2nd 953 at 962; *Barnhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 100 L. Ed. 199, 76 S. Ct. 273; *Guaranty Trust Co. v. York*, 326 U.S. 99; 89 L. Ed. 2079; 65 S. Ct. 1464, 160 A.L.R. 1231. 30 Tex. Law Review, No. 5, p. 600—"Substance and Procedure Under the Doctrine of Erie v. Tompkins."

[10] *Gifford v. Wichita Falls and Southern Railway Co.* (CCA-5th) 224 Fd. 2nd 374

[11] The Court said:

"Defendant relies chiefly on two decisions of the Texas Court of Civil Appeal, viz.: Wichita Falls & Southern Railway Company v. Foreman, 109 S.W. 2d 549 and Gillette Motor Transport Company v. Whitfield, 160 S.W. 2d 290. These cases clearly support defendant's contention and if they are controlling upon this court are decisive of this case in defendant's favor.

"The court is of the opinion, however, that they are not controlling or even applicable in this case. The matter of amendment to pleadings is a procedural matter governed by Federal law and the Federal Rules of Civil Procedure *and not by Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. See: Tozer v. Charles A. Krause Mill, 3 Cir., 189 F. 2d 242; Zumwalt v. Gardner, 8 Cir., 160 F. 2d 298; Copeland Motor Co. v. General Motors Corporation, 5 Cir., 199 F. 2d 566; Grandey v. Pacific Indemnity Co., 5 Cir., 217 F. 2d 27."

is clear that the Court of Appeals in the present case has viewed the question as one which is not governed by *Erie v. Tompkins*, and its opinion is clearly based upon the *Gifford* case, supra. While, in the view of the Petitioner, there was a distinguishing factor in the *Gifford* case, it is not necessary to discuss that here. It has been noticed in the Statement of The Case above. In any event, the Court of Appeals has quoted from and cited that case and, in consonance therewith, has based its decision upon an application of Rule 15(c) which renders the State statute of limitation ineffective.

In the recent case of *Byrd v. Blue Ridge Rural Electric Coop.*,[12] this Court has affirmed "that the Federal Court should conform as near as may be" to State rules, and has reaffirmed the so-called "outcome" test for determination of the applicability of the *Erie v. Tompkins* doctrine. Clearly, the Court of Appeals should have followed the decisions and the law of Texas in deciding the present question.

Of course, it is true that the Court of Appeals noticed (more or less in passing) the contention of the Petitioner that the State Statute of Limitations would apply to the present situation. But in its statement that the amendment joining a new party after limitation would relate back to the filing of suit against the original Defendants under Texas law, the Court of Appeals has not correctly ascertained the Texas law on that point. It has cited an inapplicable case for the statement, but it has ignored

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[12] See note 9 ante.

the controlling rules and decisions.

The Texas case of *O'Quinn v. Scott*,[13] cited by the court, was based upon two factors which were not present in the instant case. The first was that of misnomer and the second was that of the provisions of a Texas statute continuing the existence of a corporation for the purpose of suit after its dissolution. (See page 171 of the report). The present case does not involve a mere misnomer; it involves the addition of a separate and distinct entity. The original defendants were not dropped from the case at the time the new entity, the partnership, was added as a party defendant. Moreover, it is clear from the Court's opinion in the *O'Quinn v. Scott* case that the provisions of the Texas statute pertaining to corporations were determinative of its conclusion. That case involved a situation where the same named firm was first sued as a partnership when it had been a corporation. In the present case the corporation first sued and the partnership later joined were separate entities existing at the same time, and the corporation originally joined was not dismissed from the case when the partnership was added as a defendant.

When the question of parties and limitations was first raised in the Trial Court, another Texas case was cited which also was based upon misnomer, but when it was called to the Court's attention that the Supreme Court of Texas had expressly recognized that a new defendant could not be added by

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[13] *O'Quinn v. Scott*, (Tex. Civ. App.) 231 S.W. 2d 168

amendment after limitation, the notice of that case was dropped and was not cited by the Court of Appeals. However, the case of *Hallaway v. Thompson*[14] is of significance in ascertaining the law of Texas on the point because the Supreme Court, while recognizing the liberality with which the Courts would allow amendments, expressly qualified its opinion that the rule would not be applied to permit the adding of an entirely new party. The Court said:

> "Of course, this rule would not apply to an entirely new defendant who is brought in for the first time by amendment. However, we think it can be fairly applied under the facts in this case where the amendment names the same defendant, but changes the capacity in which he is sued."

Thus, in the cases cited in the Courts below, the distinction between permitting amendment on the basis of mere misnomer or permitting a new party to be added by amendment is recognized. But the Courts below have not done this in the present case.

It appears that the Court of Appeals based its decision upon a view that the present suit involved only a change in the capacity of the party. A section of Texas Jurisprudence[15] was cited by that Court; but another more applicable section in the same text

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[14] *Hallaway v. Thompson* (Texas Supreme) 148 Tex. 471, 226 S.W.

[15] 28 Tex. Jur., Sec. 114, p. 207, et seq.

has not been noticed.[16] In that text it is expressly stated that "an amendment adding new parties is, as to the latter, the beginning of a suit; and the statute runs upon the cause of action against them until they are brought into the suit."

That new or additional parties may not be added after the expiration of limitation has been consistly recognized by the Supreme Court of Texas.[17] Many of the cases cited in the margin for that statement are cited in a recent annotation in American Law

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[16] 28 Tex. Jur., Sec. 112, p. 205, et seq.

[17] *Hallaway v. Thompson* (Texas Supreme) 226 S.W. 2d 816; *Rucker v. Dailey* (1886) 66 Tex. 284, 1 S.W. 316; *First State Bank & Trust Co. v. Ramirez* (1939) 133 Tex. 178, 126 S.W. 2d 16, revg (Tex. Civ. App.) 92 S.W. 2d 523; *Cable v. Jackson* (1897) 16 Tex. Civ. App. 579, 42 S.W. 136; *Paris & G.N.R. Co. v. Robinson* (1910, Tex. Civ. App.) 127 S.W. 294, revd on other grounds 104 Tex. 482, 140 S.W. 434; *Dickson v. Lights* (1914, Tex. Civ. App.) 170 S.W. 834, revd on other grounds; *Simmons v. Dickson*, 110 Tex. 230, 218 S.W. 612, which in turn was mod 110 Tex. 234, 218 S.W. 365; *Wooster v. Hoecker* (1917, Tex. Civ. App.) 195 S.W. 332; *Cozier v. Andrews* (1918, Tex. Civ. App.) 206 S.W. 975; *Gordon v. Hanaman* (1921, Tex. Civ. App.) 234 S.W. 569, revd on other grounds (Tex) 261 S.W. 1006; *Minter v. Gulf, C. & S. F. R. Co.* (1922, Tex. Civ. App.) 243 S.W. 476; *Mood v. Methodist Episcopal Church South* (1926, Tex. Civ. App.) 289 S.W. 461, mod (Tex. Com. App.) 296 S.W. 506 and mod on other ground (Tex. Com. App.) 300 S.W. 30; *McGee v. Ferguson Seed Farms* (1931, Tex. Civ. App.) 34 S.W. 2d 338; *Rodriguez v. Shacklett* (1940, Tex. Civ. App.) 144 S.W. 2d 296; *Gainesville v. Harder* (1941, Tex. Civ. App.) 147 S.W. 2d 959, affd 139 Tex. 155, 162 S.W. 2d 93; *Stanolind Oil & G. Co. v. State* (1941, Tex. Civ. App.) 153 S.W. 2d 614; *Hodges v. Price* (1942, Tex. Civ. App.) 163 S.W. 2d 868 (dictum); *Uhl v. Musquez* (1856) 1 Posey Unrep Cas 650.

Reports[18] pertaining to the bringing in of new defendants by amendment. The Court's attention is invited to a quotation from the annotation mentioned which is set forth in the margin.[19]

In the opinion of the Court of Appeals it was correctly stated that "the effect of Rule 28 of the Texas Rules of Civil Procedure is to treat the partnership as a legal entity, at least to the extent of obtaining and enforcing a judgment by or against it." The Petitioner readily agrees that this statement is correct and that it has been sustained by the Courts of Texas. Following that holding and viewing the partnership in the present case as an entity, there is an authoritative case which becomes peculiarly and specifically applicable and which would appear to rule the case at bar.

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[18] 8 ALR 2d, p. 112—"When New Defendant is brought in by Plaintiff."

[19] In the annotation it was said:

"The first question to be dealt with, and the one most frequently raised, is whether and under what circumstances a plaintiff may bring one or more additional defendants into the action after the statute of limitations *has made it impossible for him to bring such action directly against them.*

"*The answer to this question is well settled.* Where a defendant is brought into action for the first time upon the filing of an amended or supplemental complaint, the filing of the amendment constitutes the commencement of the action in so far as such new defendant is concerned. The statutory period runs until the time of the filing of the amendment; and if at that time the action is barred, *a party thus subsequently brought in may avail himself of the plea. No case has been found in which the soundness of this rule has been doubted.*" (emphasis added)

In the case of *West v. Johnson*[20] two corporate entities were involved. The person upon whom summons of service was made was the agent for both corporations. It developed that the second Corporation was the one actually intended to be sued while the first was the one named in the summons. But the Court held that the second party could not be joined in the suit by amendment after the period of limitation even though its agent had been served with citation in the case and the Plaintiff had actually intended to sue the person owning the property.

That case is also particularly pertinent here in connection with the statements of the Court of Appeals as to a disclosure of particular facts. In the *West v. Johnson* case, supra, the argument was made that the Defendant should have disclosed all of the details, but the Court held that even if that had been done, the time for answering would still have fallen beyond the period of limitation, and such a disclosure would not have altered the circumstances. That is exicatly the situation here.

While the *West v. Johnson* case was decided by the Court of Civil Appeals, an application to the Supreme Court of Texas was "refused", which signified that the Supreme Court of Texas has approved the opinion and the statements and decision of law made by the Court of Civil Appeals.[20a]

On the whole, then, the Court of Appeals did not

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[20] *West v. Johnson* (Tex. Civ. App.—Error Refused) 129 S.W. 2d 811

[20a] Rule 483, Texas Rule of Civil Procedure

correctly ascertain and follow the law of Texas pertaining to the joining of a new party after limitation and, in consequence, did not apply the correct rule of decision within the doctrine of *Erie v. Tompkins*.

The third reason given for this Court's granting the writ in the present case (stated in the first paragraph of this section) is that, in any event, the Court of Appeals incorrectly applied the provision of Rule 15(c) of the Federal Rules of Civil Procedure and that it did so inconsistently with the decisions of this Court, as well as other Federal Courts and State Courts. In that connection, it should be first noted that this rule says nothing pertaining to the joinder of parties, and only provides that amended pleadings will relate back when they arise out of "the conduct, transaction, or occurrence" set forth in the original pleading. But that rule is misapplied to a matter involving the joinder of a new party. It is established that the adding of a new party defendant is deemed to be the commencement of the action as to the additional party.

There is literally an abundance of cases from a majority of the jurisdictions in the United States, which support the Petitioner's contentions here, cited to the comprehensive annotation in the American Law Reports.[21] Included in the numerous citations are many covering decisions of Federal Courts which are cited as supporting the general rule that

[21] 8 ALR 2d, p. 112, Sec. 53 et seq. and see Federal cases cited on page 112.

the Statute of Limitations continues to run in favor of third persons brought in by amendment as parties defendant until they are actually made parties.[22]

Two other cases by this Supreme Court of the United States are cited in the Digest for the proposition here relied upon by the Petitioner. In *Davis v. Cohen & Co.*[23] suit was filed against the Railroad Company and later and after the expiration of time the Director General of the Railroad Administration was attempted to be joined as a party by amendment. An agent of the Railroad Company had been served. Process against the Director General might have been served upon the same agent "if suit had been brought against him." This Court said that it was immaterial and quoted from another case that the Director General "was not bound to

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[22] *Miller v. M'Intyre* (1832) 6 Pet. 61, 8 L. ed. 320; *United States v. Martinez* (1904) 195 US 469, 49 L. ed. 282, 25 S. Ct. 80; *United States v. Smith* (1910, CC CB) 181 F. 345, affd (CA 9th) 196 F. 593, decree amd 203 F. 594, which was affd 236 US 574, 59 L. ed. 725, 35 S. Ct. 440; *United States v. Norris* (1915, CA 8th Okla) 222 F. 14; *Herbert v. Payne* (1923, CA 8th NM) 291 F. 555 (dictum); *United States v. Bellingham Bay Improv. Co.* (1925, CA 9th Wash.) 6 F. 2d 102; *Lindgren v. United States Shipping Bd. Merchant Elect Corp.* (1932, CA 4th Va.) 55 F. 2d 117, cert den 286 US 542, 76 L. ed. 1280, 52 S. Ct. 499; *Schram v. Poole* (1938, CA 9th Cal.) 97 F. 2d 566; *Didier v. Crescent Wharf & Warehouse Co.* (1936, DC Cal.) 15 F. Supp. 91; *Garry v. Allborg* (1939, DC Ill.) 1 FRD 131; *Holliday v. Mangels* (1940, DC Fla.) 33 F. supp. 471 (vacated on other grounds in *Holliday v. Wade* (CA 5th) 117 F. 2d 154); *O'Neil v. American Radiator Co.* (1942, DC N.Y.) 43 F. Supp. 545; *Lommer v. Scranton-Spring Brook Water Service Co.* (1943, DC Pa.) 3 FRD 27; *Anderson v. Brady* (1946, DC Ky.) 7 FRD 84.

[23] *Davis v. Cohen & Co.* (U. S. Supreme) 69 L. Ed. 1129

take cognizance of an action against the Railroad Corporation, even though the service was on the same local station agent, and even though the complaint stated the cause of action for personal injuries sustained during the Government control." Clearly, this case sustains in principle the Petitioner's contention. The Court of Appeals has recognized there was no actual summons or service in the present case. Its decision is predicated upon the proposition that there was some kind of notice to the partnership through the fact that individuals originally joined in the suit were members of the partnership. Unless the partnership was named, or unless the individuals were sued as partners or members of the concern, a mere informal notice would not be sufficient to circumvent the State Statute of Limitation.

In *Mellon v. Arkansas Land and Lumber Co.*[24] this Court found error in a holding of the Supreme Court of Arkansas that a subsequently appointed director could be joined by amendment on the basis of it being a substitution for a previous director. The Court held that the amendment constituted the bringing in of a different defendant and was not simply a correction in name or a substitution. The Court held that since the amendment bringing in the new director was made subsequent to the period of limitation prescribed by the State statute, the plea would be sustained and the suit dismissed.

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[24] *Mellon v. Arkansas Land and Lumber Co.* (U. S. Supreme) 275 U. S. 460, 72 L. Ed. 372, 48 S. Ct. 150

In the present case, the Court of Appeals has quoted partially from Barron & Holtzoff in their authoritative work on Federal Procedure.[25] But it has failed to properly apply the rule that was stated, and it has also failed to notice the remaining parts of the text that is applicable. The pertinent paragraph from that text as to the question here is set forth in the margin.[25]

It is recognized that it is not within the scope of this petition to brief the question, or the contentions made, exhaustively. The majority rule, supported by decisions of this Court, is that the joining of a new party after the period of limitations may not be permitted; and the cases are based upon the proposition that when a new party is attempted to be joined by amendment, it is in fact the commencement of the action as to that party. It was not intended that the actual date of the commencement of the action should be rationalized out of a case, or circumvented, by reading into a Federal Rule of Procedure things that it did not intend to cover.

Illustrative of recent Federal cases regarding the

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[25] 1 Barron & Holtzoff, Federal Practice and Procedure, p. 933, Sec. 451:

"If the effect of an amendment is to substitute a new party for one originally named, it has been held to constitute a new and independent claim for relief which cannot be allowed after the statute of limitations has expired. Similarly, *an amendment will not be permitted if it would mean the bringing of an action against new parties in whose favor the statute has run*, or against new parties not subject to the court's jurisdiction." (Emphasis added)

joinder of an additional party after the period of limitation are those of *Hale v. Morgan Packing Company*,[26] *Kerner v. Rackmill*,[27] *Florentine v. Landon*,[28] *and Wagner v. New York, Ontario and Western Railway Company*.[29] In the *Hale* case, motion to substitute new parties after the period prescribed by the statute was denied, in spite of the Plaintiff's contention that there was only a misnomer. In the *Kerner* case, the Court, while stating that it was fully aware of the tendency toward liberality in allowing amendments, refused to deprive the corporations sought to be joined of its defense of the running of the statute of limitations after the Plaintiff made a contention that the amendment was only to correct a misnomer. This Court's attention is particularly invited to the opinion of the Court in that case. For the proposition that amendment cannot be allowed after limitation, the case of *Davis v. Cohen & Company*, supra, decided by this Supreme Court is cited.

The *Davis* case is also cited in the opinion of the Court in *Florentine v. Landon*. The *Mellon v. Arkansas Land and Lumber Company* case, supra, is also cited in the Court's opinion. The *Florentine* case is particularly applicable here because it specifically notices and quotes Rule 15(c) upon which the Court

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[26] *Hale v. Morgan Packing Co.*, 91 F. Supp. 11

[27] *Kerner v. Rachmill*, 111 F. Supp. 150

[28] *Florentine v. Landon*, 114 F. Supp. 452

[29] *Wagner v. New York, Ontario and Western Railway Company*, 146 F. Supp. 926

of Appeals in the present case based its decision.

In the *Wagner* case, supra, the complaint was filed against the Railroad Company and summons was issued. It developed that the Trustee, not the Railroad Company, was the real party in interest, and it was held that an amendment of pleading, which brings in a new party into the action, will not be permitted after statute of limitation has run. In that case also, cases by this Supreme Court of the United States are cited and followed. In the concluding part of the opinion, the matter of service is noticed (Page 931). Service was procured upon the train master and it was held that the trustee would not be bound by service of that nature. And in the concluding paragraph, the Court said:

> "Granting the trend toward liberality, the desire that cases be decided upon their merits, and that justice be done between the parties, *the statute of limitations, in aim and purpose, is a part of the law and should not be expunged by interpretation from the statute books.*" (Emphasis added)

So in the present case, the Petitioner grants a trend toward liberality in the amendment of pleadings, but respectfully urges to this Court that neither this, nor the terms of Rule 15(c) were intended to expunge by interpretation the state's statute of limitation. Liberality and the provisions of the rule were not intended to supersede and overrule the settled principal that an additional party may not be joined as a defendant in a case after the period of limita-

tion by the filing of an amendment. The summons and service is the test. The action is commenced against the new party as of the time of the filing of the amendment. It may not be held to relate back.

Thus, the decision of the Court of Appeals in the present case was substantially in conflict with the law of Texas regarding its statute of limitations and, as well, is in conflict with the settled rules and principles evidenced by the decisions of this Supreme Court and other Federal courts.

In addition to the three reasons hereinabove given for the Court granting the writ on this question, a fourth reason might be assigned in the terms of Rule 19 of the Rules of the Supreme Court of the United States: The Court of Civil Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

As to Liability

The opinion of the Court of Appeals regarding the question of liability in the present case is so patently and fundamentally in error that the Petitioner, while making every effort to abbreviate this petition, is compelled to present to this court the more substantial matters in that connection. And while there are no statutes or Federal rules involved in a determination of liability, the reasons for this Court's granting the writ are still, in the Petitioner's view, substantial. This is a "Master and Servant" case which has been decided by the Court of Appeals

on an entirely different basis.

More specifically, the reasons for the Court's granting the writ include its failure to follow the law of Texas under the requirements of the *Erie V. Tompkins* doctrine, its rendering a decision inconsistent with prior decisions of this and other Federal Courts, and indeed, the Court of Appeals in its determination of liability has so far departed from the usual course of judicial proceedings as to call for an exercise of this Honorable Court's supervision. The Court of Appeals has decided the matter of liability upon a basis which was not presented or argued by either of the litigants and which was outside of the issues joined in the case.

This petition will not be burdened with further notice of the matters included in the findings of the Trial Court. The Court of Appeals did not notice any of those matters, or the assignments to them, in its opinion. Whether its disregard of the specific assignments and its rendering a decision for the Respondent on another basis is to be taken as the Court's having impliedly sustained them or found them with merit is a matter left to the discernment of this Court. There has been filed in this Court with the record a copy of the Apellants' Brief in the Court of Appeals, and this was done so that the matters presented to the Court of Appeals would be available to this Court in the event of its desire to examine them more particularly.

The facts in the case pertaining to liability, or to negligence and proximate cause, have been summarized in the Statement of the Case above.

There are two factual matters which, the Petitioner submits, are conclusive in the present case as a matter of law. These are the servant's knowledge of the claimed defect in the equipment that he was using and also his knowledge of the situation and of the properties of gasoline. Such knowledge on the part of the servant precludes, as a matter of law, any finding of primary negligence on the part of the master; and it also constitutes a basis for the defenses of assumed risk and contributory negligence. This is the settled law in Texas as well as in the decisions of this Supreme Court of the United States.

The employer is not an insurer. It is not required to furnish the newest, safest and best tools and appliances to the servant. Nor is the employer required to frequently inspect and keep in a constant state of repair ordinary and usual tools or appliances used in the business or work.

In its opinion, the Court of Appeals cited the case of *Nesmith v. Magnolia Petroleum Company*[30] for the proposition that gasoline has dangerous properties. With that the Petitioner agrees. But it is not understood why the Court of Appeals did not take any notice of the other holdings in that same case that are applicable here. In that case it was expressly held that a pump of the kind involved in the present case, which was being used by the Respondents at the time of the accident, was a "simple de-

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[30] *Nesmith v. Magnolia Petroleum Company*, (Tex. Civ. App.) 82 S.W. 2d 721

vice." The Court also took cognizance, in the *Nesmith* case, of the fact that the Plaintiffs knew that the nozzle of the hose was missing, that the matter was under the Plaintiff's unsupervised and undirected control, and that there was no causal connection between any breach of duty of Defendant and the explosion causing the accident. *All of those matters clearly obtain in the present case.* If the Court of Appeals chooses to follow this *Nesmith* case as constituting the law in Texas, then it should follow the complete holdings of the case and should not simply isolate those particular holdings which might serve a rationalized opinion.

The *Nesmith* case recognizes that the pump was a "simple device." Such a recognition would bring the present case within the so-called "simple tool doctrine." This Court is undoubtedly familiar with the simple tool doctrine, and it will not be elaborated here.

The simple tool doctrine is closely related to the so-called "equal opportunity" rule which is, simply, that if the servant is in an equal position with the master to discover the defects or know the danger existing in any equipment that he uses or in any situation in which he works, then the master cannot be held liable for injuries sustained by him.

The foregoing rules are so well settled in both the law of Texas and in the decisions of Federal courts that they will not be further discussed here. The authorities that were relied upon by the Petitioner in the Court of Appeals for its position of not

being guilty of primary negligence are set forth in the margin.[35]

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[35] *Grammer v. Mid-Continent Petroleum Corporation* (CAA-10th) 71 F. 2d-38 at p. 40–Certiorari denied, 293 U. S. 571, 79 L. Ed. 670; *McGivern v. Northern Pac. Ry. Co.* (CCA-8th) 152 F. 2d 213; *Gulf C. & S.F.R. Co. v. Larkin*, (Texas Supreme 82 S.W. 1026; *McNeal v. Otto* (CCA-10th) 92 F. 2d. 289 at p. 291; *Middleton v. National Box Co. D.C.S.D. Miss.*, 38 F. 2d 89, 91; *D-Bar Ranch v. Maxwell* (CCA-Ft. Worth) 170 S.W. 2d 303–Error Refused; *Jacob v. City of New York* (C.A.A.–2nd) 119 F. 2d 800 at pp. 801-802; *Newborn v. Great Atlantic and Pacific Tea Company* (CCA-4th) 69 F. 2d 523; *Great Atlantic and Pacific Tea Co. v. Coleman* (CCA–Galveston) 259 S.W. 2d 319; 29 Tex. Jur., For discussion of latent and patent defects, Section 122, p. 214, and see particularly "equal opportunity" rule, Section 123, p. 215; *Grossaupp v. Chicago and N. W. Ry Co.*, 14 F. Supp. 276 at p. 278; *Harrison v. L. E. Myers Construction Company* (CCA-8th) 42 F. 2d 950 at page 952; *Traffic Motor Truck Corporation v. Claycell* (CCA-8th) 12 F. 2d 419; *Stevens v. E. I. DuPont De Nemours N. Co.*, (CAA-5th) 208 F. 2d 415; *Great Atlantic and Pacific Tea Co. v. Evans* (Tex. Sup.) 175 S.W. 2d 249; 56 C.J.S. Sec. 284, p. 1045; See 56 C.J.S., p. 1058 where illustrations are given with citation of cases; 56 C.J.S., Sec. 296, p. 1057-1058; *Fitzpatrick v. Fowler* (CCA–Dist. of Columbia) 168 F. 2d 172; 65 Am. Jur., Sec. 148, pp. 580-581; *Traffic Motor Corporation v. Claycell, et al.* (CCA-8th) 12 F. 2d 419; *Mitchell v. Comanche Cotton Oil Co.* (CCA-Tex.–writ refused) 113 S.W. 158; Annotation 86 A.L.R., p. 8 at p. 67, Sec. 16, "Necessity of showing more assistance may have averted injury," where several cases are digested; *Sears Roebuck and Company v. Talley* (CCA-5th) 239 F. 2d 82 at page 84; *Great Atlantic and Pacific Tea Co. v. Lang* (CCA-Eastland–writ refused N.R.E.) 291 S.W. 2d 366 writ ref. N.R.E.; *Harris v. Railway Express Agency*, (CCA-10th) 178 F. 2d 8; *August v. T.N.O. R. Co.* (CCA-Beaumont–writ refused N.R.E.) 265 S.W. 2d 148; *Shumake v. Great Atlantic and Pacific Tea Co.* (CCA-Galveston–writ refused N.R.E.) 255 S.W. 2d 949; *Johns-Manville v. Pocker* (CCA-8th) 26 F. 2d 204, at pp. 206 and 207; *McCann v. Grider* (CCA-San Antonio) 83 S.W. 2d 707, Writ Ref.; *Turnbow v. Panhandle & S. F. Ry. Co.* (CCA-Eastland) 127 S.W. 2d 982

A pivotal consideration, in the light of the opinion of the Court of Appeals in this case, is the question of control over the gasoline and the equipment. The Court has implied (although it did not expressly so state) that it was of the opinion that those were under the control of the Petitioner, The report of the case (in Syllabus No. 7) states a person who has control over gasoline must use great care to prevent an injury which a prudent man would forsee. In the *Nesmith v. Magnolia* case, supra, the Court in part based its decision upon a consideration that the equipment and gasoline there involved was under the "unsupervised and undirected control" of the Plaintiff.

Who was in the control of the gasoline and the equipment at the time of the accident in the present case? Certainly control must be fixed in relation to the accident and cannot be determined on some remote connection with the use of gasoline in the first place. From the fact that the Petitioner used gasoline on its farm in an ordinary and customary manner, it does not follow that it occupies the same position as a regular marketer of gasoline maintaining dangerous conditions at a gasoline and oil warehouse. The case of *Waters-Pierce Oil Co. v. Snell*[22] is not applicable here. Parenthetically, it is noted that it is the present law of Texas that even as to persons handling explosives the doctrine of Res Ipsa Loquiter does not apply and specific negligence

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[22] *Waters-Pierce Oil Co. v. Snell* 106 S.W. 170

in the handling of those explosives must be shown.

In any event, the undisputed facts in the present case make manifest the error of charging the Petitioner with negligence on the basis of control. The Respondent himself was in control of the gasoline and the equipment at the time of the accident. He was entirely alone. And indeed, it was submitted to the Court of Appeals and it is still urged here that the method used by the Respondent in the performance of his work was the factor actively causing the accident. When the circumstances are considered fairly and completely, they are so compelling that the accident is one of a nature that it virtually speaks for itself. If the doctrine of Res Ipsa Loquiter has any application at all in the present case, it clearly demonstrates the contributory negligence of the Respondent.

In passing, this Court's attention is also invited to the report of this case (see Syllabus No. 9) where in the summary of the Court's holding it is made to appear that the Petitioner—not the Respondent—was the one transferring the gasoline. That is a fair inference to be drawn from that part of the Court's opinion deciding the question of liability, but, of course, it is obviously not based on fact. It was the Respondent who, while alone, was transferring the gasoline with knowledge of its danger and knowledge of defects in the equipment.

It is Petitioner's position that a correct decision as to liability in this case could rest upon either of the three alternatives of there being no primary

negligence on the part of the Petitioner; there being contributory ngligence on the part of the Respondent, or of the Respondent having assumed the risk in the situation at the time of the accident. In this connection the Court's attention is invited to a statement by the Supreme Court of Texas as to these bases for denying liability.[33]

The Court of Appeals has, as stated, expressly found that the knowledge of the properties of gaso-

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[33] *Robert E. McKee v. Patterson* (Texas Supreme–1954) 271 S.W. 2d 391, where, at page 393, it was said:

"There are two legal theories, wholly aside from the plaintiff's own negligence, for denying liability in a suit against an owner or occupier of land brought by an invitee for injuries growing out of open and obvious dangers thereon. One rests on the judicial concept that there is no breach of any duty the landowner owes to his invitees. The othe rarises out of the doctrine of volenti non fit injuria--voluntary encountering of risk–which is regarded as a defense to all negligence actions. In this state both theories are recognized. Actually, in their application to a given fact situation the two theories so completely overlap as to be almost indistinguishable. Actually, also the defenses of voluntary exposure to risk and contributory negligence are frequently treated as one and the same. The failure of counsel to segregate and separately preserve all of these questions in pleadings in the trial courts and in briefs in the appellate courts no alternative except to decide the cases before them on the questions presented, and the tendency of the appellate courts to group them in analyzing the evidence, or to seek the most obvious and simplest solution, has led to much confusion in the decided cases. In the greatly similar fact situations some are decided on the basis of no breach of duty by the defendant, some on the basis of voluntary encountering of risk by the plaintiff, some on the basis of the contributory negligence of the plaintiff, and some on the basis of two or more of these factors without distinction between them. This has led to what appears to be conflicting results."

line was to be imputed to the Respondent. The Trial Court expressly found that the Respondent had knowledge of any defect in the pump or the equipment. With those two facts undisputed in the record, there is a compelling basis for the defense of contributory negligence and assumed risk.

In looking for a case closely parallel to the one at bar, there was found one decided by the Supreme Court of Michigan which involved the filling of a tank of an automobile with a lantern in close proximity to it. The Court's attention is specially invited to the case of *Gust v. Muskegon Cooperative Oil Co.*[34] This case was quoted at some length in the original brief.[35] There the Court held that the direction of a verdict was proper and that the Plaintiff was guilty of contributory negligence *as a matter of law*. The Court discussed the possibilities of injury from gasoline and the matter of foreseeability.

Even the Fifth Circuit Court of Appeals decided a case involving the handling of gasoline and predicated its decision upon it being common knowledge that it was dangerous and that the Plaintiff came to his death as a result of his own negligence.[36] It cannot be explained how the same court has reached a different conclusion in the present case after find-

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[34] *Gust v. Muskegon Co-operative Oil Co.* (Michigan Supreme) 198 N.W. 175, 33 ALR 772.

[35] See Brief pp. 102-104.

[36] *Burnett v. Amalgamated Phosphate Co.* (CCA-5th) 96 F. 2d 974.

ing the same basis existed here.

Most of the cases that were cited to the Court of Appeals regarding the matters of contributory negligence and assumed risk were ones deciding the matter on the basis of established rules applied to undisputed facts.[37]

The decisions of this Supreme Court of the United State are consistent with the Texas cases cited and the decision of the Court of Appeals in the present case is in conflict with them. So in *Hough v. Texas and P. R. Company*[38] it was held that an employee who, after discovering the defective condition of an appliance continues to use it without giving notice to the employer is guilty of such contributory negligence as will bar a recovery for injury caused by such defect. To the same effect is the case of *Texas & P. R. Co. v. Archibald*.[39] In *Washington*

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[37] *City of Munday v. Shaw* (Tex. Civ App.—Writ Dismissed) 100 S.W. 2d 765; *Johns-Manville v. Pocker* (CCA-8th) 26 F. 2d 204; *Gulf W. T. & P. Ry. Co. v. Smith* (Civ. App.—Writ Refused) 83 S.W., 719 at p. 720; *Kuptz v. Ralph Sollitt and Sons Const. Co.* (CCA-5th) 88 F. 2d 532; *Crews v. Texas and Pac. Ry. Co.* (Tex. Civ. App.) 149 S.W. 2d 1079—Writ dism., Judgment Correct; *Clayton v. Chicago & R. I. Ry. Co.* (Tex. Civ. App.) 129 S.W. 2d 693, and affirmed by Supreme Court, 1954 S.W. 2d 453; *Waring v. Harris* (Tex. Civ. App.—Writ Refused) 221 S.W. 2d 345; For an example of other and older cases see *Gilbert v. Mayer*, 99 S.W. 2d 1021; *Patton v. Dallas Gas Co.* (Tex Supreme) 192 S. W. 1060; *St. Louis Southwestern v. Hynson* (Tex. Supreme) 109 S.W. 929; *Parish v. Missouri M.K.T. Ry. Co.*, 76 S.W. 234.

[38] *Hough v. Texas & P. R. Co.* (U.S. Supreme) 100 U.S. 213 25 L. Ed. 612

[39] *Texas & P. R. Co. v. Archibald* (U.S. Supreme) 170 U.S. 664, 42 L. Ed. 1188.

and G. R. Co. v. McDade[40] this Court again stated that if an employee knew of the defect and yet continued to use the machinery without giving notice, he assumed the risk of danger from such use. And the general common law rule, which is applicable in the case at bar and which is followed by the Courts of Texas in this kind of case, was stated by this Supreme Court of the United States in *Texas & P. R. Co. v. Harvey.*[41] The last case was of course decided upon the terms of particular statute, but it has already been noted that farmers and agricultural employees do not come within the purview of any Texas statute and that the general common law rules consistently followed by the Texas courts are decisive of the questions here.

In the last cited case the opinion of this Court states the rule applicable in the present case which, when properly understood and applied precludes any recovery by the Respondent:

> "Where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment

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[40] *Washington & G. R. Co. v. McDade* (U.S. Supreme) 135 U.S. 554, 34 L. Ed. 235

[41] *Texas & P. R. Co. v. Harvey* (U. S. Supreme) 228 U.S. 319, 57 L. Ed. 852

without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. St. Rep. 561."

Conclusion

The foregoing considered, it is respectfully submitted that this Honorable Court should grant certiorari here to prevent the thwarting of its doctrine that Federal Courts conform to the law of the state; to require that state law be correctly ascertained and followed; to resolve conflict or inconsistency between the decisions of the Court of Appeals (5th Cir.) and those of this and other Federal Courts; to put at rest the question of Rule 15(c) being so interpreted and applied as to "expunge" the statute of limitation from the law; to require that the case be decided within and on the basis of the issues and theories presented by the litigants; and to exercise

its supervision over a substantial departure from the usual course of judicial proceedings.

Respectfully submitted,

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I certify that a copy of the foregoing Petition for Writ of Certiorari has been forwarded by U. S. Mail to the Attorneys for the Respondent who are Carter, Steirnberg & Skaggs, Harlingen, Texas and Sid L. Hartin, Edinburg, Texas.

Jackson Littleton

JACKSON LITTLETON

— APPENDIX —

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16296

TAORMINA CORPORATION, ET AL,
APPELLANTS,

VERSUS

ANTONIO ESCOBEDO,
APPELLEE.

Appeal from the United States District Court for the Southern District of Texas.

(April 8, 1958.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: Antonio Escobedo, the appellee, is a Mexican by birth and citizenship. One of his arms was crippled as the result of a fracture which had been improperly set. At or about the age of thirty-two he procured employment as a laborer on the farm of the appellant, Taormina Company, a

partnership. His work was done under the direction of Taormina Company's foreman, Domingo Cavazos. In the farm operations a pump was used for taking water from an irrigation ditch. The pump operated continuously and was powered by a stationary tractor. At frequent intervals it was necessary to refill the gasoline tank of the tractor. This was done by transferring gasoline from a metal drum to the tank of the tractor a few feet away by a hand operated pump. This was done by the appellee on the afternoon of May 17, 1952. He was given the same task that night. The foreman under whom the appellee worked told him to get a lantern from the barn. This the appellee did. It was an open flame kerosene lantern. At the site of the pumping operation the appellee set the lantern down about three feet from the drum. The hose through which the gasoline was pumped to the tractor was about eight feet long. One end of the hose was in the tractor tank and was tied down by the appellee. The other end slipped over a nipple on the pump where it was normally fastened by a metal clamp. On the night in question the clamp was missing. The appellee started filling the tank, operating the pump with one hand and holding the hose with the other. The hose slipped free of the pump nipple and gasoline was sprayed upon the appellee and the lantern, flashing into flames which severely burned the appellee.

Asserting negligence and seeking damages, the appellee brought suit in the United States District Court for the Southern District of Texas against Taormina Corporation, a Texas corporation; E. A.

Taormina, A. F. Taormina, and Frank Culicchia. Diversity of citizenship formed the basis of federal jurisdiction. The complaint was filed on May 3, 1954. On May 15, 1954, after summons was served on the defendants named, but before they had answered, a first amended complaint was filed against (1) Taormina Corporation, a Texas corporation, (2) Taormina Corporation, a Delaware corporation, and (3) the two Taorminas and Culichia "individually and as trustees of the said Taormina Corporation (a Delaware Corporation)". It may here be parenthetically observed that the appellee was injured on May 17, 1952, and that the Texas statute of limitations, Vernon's Ann. Tex. Civ. Stat. Art. 5526, required suit to be brought within two years. Those sued filed motions to dismiss and answers. On July 26, 1954, the appellee filed his second amended complaint. By it he added as defendants Taormina Company, a partnership, and its eight or nine partners, among whom were the previously mentioned two Taorminas and Culicchia. Taormina Company, the partnership, and the persons designated as partners, moved to dismiss the second amended complaint on the ground that it affirmatively appeared that the claim asserted was barred by the statute of limitation. The district court sustained the motion as to the individuals other than the two Taorminas and Culicchia. At the trial the appellee dismissed as to all defendants except the partnership and the three individuals originally served.

The cause was tried without a jury. The district court found that the appellants, that is, Taormina Company, a partnership, and A. F. Taormina, E. A.

Taormina, and Frank Culicchia, individually and as members of such partnership, were negligent (a) in providing the appellee with defective equipment with the knowledge of the foreman, Cavazos, (b) in failing to provide the appellee with a safe place to work, (c) in failing to give the appellee adequate warnings and instructions, (d) in failing to provide the appellee with assistance, or in one or more of these respects, and that such negligent acts were the proximate cause of the appellee's injury. The court found against the appellants on their defenses of assumed risk and contributory negligence. A judgment for the appellee was entered in the amount of $20,000. From such judgment this appeal has been taken. The questions fall into two classes, one as to parties and limitations, and the other as to liability. We will first consider the question of parties and limitations.

The two Taorminas and Culicchia were parties in their individual capacities and were expressly so designated and served before the running of the limitation period. In their individual capacities they are in no position to benefit from the statute of limitations. Can these individuals as partners, or can the partnership, successfully defeat the appellee's claim on the ground that it is barred by limitations? The Federal Rules provide:

> "Whenever the claim or demand asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendement relates back to the date of the original pleading." Rule 15(c) Fed. R. Civ. Proc. 28 U.S.C.A.

This rule, among others, was designed so that cases would be determined on their merits and not on technicalities. *Copeland Motor Co. v. General Motors Corp.*, 5th Cir. 1952, 199 F. 2d 566. "If the effect of an amendment is to substitute a new party for one originally named, it has been held to constitute a new and independent claim for relief which cannot be allowed after the statute of limitations has expired." 1 Barron and Holtzoff, Federal Practice & Procedure 933, §451. This Court has previously approved and quoted the following:

> "The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person." 2 Moore's Federal Practice, 2nd ed., Sec. 4.44, p. 1042; *Grandey v. Pacific Indemnity Co.*, 5th Cir. 1954, 217 F. 2d 27, 29.

Here the appellee had been hired to work on a farm with which the Taormina family was connected. The true interests were not disclosed and disclosure was studiously avoided. We do not say that the partnership was required to make any disclosures but it should not be permitted to benefit by not having done so. It was the entity by whom he was employed against which he had and intended to assert a claim. Those who had the liability had notice of the suit. The appellee is entitled to the benefits of the Rule.

the second amendment was properly allowed, and the appellants were properly made defendants by the amendment. See *Gifford v. Wichita Falls & Southern Railway Co.*, 5th Cir. 1955, 224 F. 2d 374.

The appellants assert that when the seven partners were dismissed the action could not thereafter be maintained against the remaining three. But the three were sued in their individual capacities and in that capacity was judgment entered against them. It was formerly the Texas rule that a partnership could not be sued in the partnership name and that all active partners were necessary parties. 32 Tex. Jur. 380, Partnership § 102. By Rule 17(b) Fed. R. Civ. Proc., it is provided that capacity to sue or be sued shall be determined by the law of the state in which the district court is held. Since the adoption of the Texas Rules of Civil Procedure partnerships may sue or be sued in the partnership name. Rule 28 Tex. R. Civ. Proc. The effect of this Rule is to treat the partnership as a legal entity, at least to the extent of obtaining and enforcing a judgment by or against it. Members of the partnership may become individually liable for partnership obligations when made parties in their individual capacities. *Mims Bros. v. N. A. James*, Tex. Civ. App. 174, S. W. 2d 276. This contention of the appellants is not well taken.

It has been suggested that the law of Texas will control the applicability of its statutes of limitations. Cf. *Denver and Rio Grande Western Railroad Co. v. Clint*, 10th Cir. 1956, 235 F. 2d 445. The amendment

properly related back to the time of the filing of the complaint under the law of Texas as well as under Federal law. *O'Quinn v. Scott*, Tex. Civ. App., 251 S.W. 2d 168. The claim of appellee against the appellants was not barred by limitations.

Gasoline is volatile, inflammable and explosive. The knowledge that it has these properties is so general that it can be imputed to the appellee as well as to the appellants. *Nesmith v. Magnolia Petroleum Co.*, Tex. Civ. App., 82 S.W. 2d 721. The nature of the substance is such that a person who has control over it must exercise great care to prevent an injury which a prudent man would foresee. *Waters-Pierce Oil Co. v. Snell*, 47 Tex. Civ. App. 413, 106 S.W. 170. The transfer in the night time of gasoline with a defective pump by the light of an open flame was certainly an event from which it could be anticipated that an injury might result. The consequences of such conduct should have been foreseen. 30-B Tex. Jur. 218 et seq., Negligence §§ 41-43. This is no less so because the same acts had been previously done without injury resulting. *Waters-Pierce Oil Co. v. Snell, supra.* The appellee successfully contended that his injuries were caused by the negligence of the appellants. They contended before the trial court and contend here that the contributory negligence of the appellee was the cause of his injuries. The question of whether a plaintiff has been guilty of contributory negligence, like the question of whether the defendant has been guilty of primary negligence, is ordinarily a fact question and is ordinarily to be resolved by the trier of the facts. Only where the facts are of such a character that but one ration-

al conclusion could be drawn by reasonable minds do such issues become questions of law. *Lang v. Henderson*, 147 Tex. 353, 215 S.W. 2d 585; *Phelps v. Drainage District*, Civ. App. 216 S.W. 842; *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, reh. den. 336 U. S. 940, 69 S. Ct. 744, 93 L. Ed. 1098; *General Accident Fire & Life Assurance Corporation v. Zapel*, 5th Cir. 1956, 231 F. 2d 917; *Roucher v. Traders & General Insurance Co.*, 5th Cir. 1956, 235 F. 2d 423; *Greyhound Corporation v. Dewey*, 5th Cir. 1957, 240 F. 2d 899; *Brinson v. Illinois Central Railroad Co.*, 5th Cir. 1957, 241 F. 2d 494; *Goldman v. Hollywood Beach Hotel Co.*, 5th Cir. 1957, 244 F. 2d 413. The rule is as applicable where the judge is the trier of facts as where a jury is in the box. *Booth v. Home Indemnity Co.*, 5th Cir. 1957, 244 F. 2d 568. We need not enlarge upon the recital of the evidence before the Court. It is enough to say that there was ample evidence to sustain the Court's finding that the appellants were negligent and that their negligence was the cause of the appellee's injuries. The evidence justifies the Court's conclusion that there was no contributory negligence of the appellee which barred recovery.

We find no reversible error and the judgment of the district court is

AFFIRMED.

A true copy

Test: /s/Edward W. Wadsworth
EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit
(SEAL) New Orleans, Louisiana

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No. 190

IN THE

Supreme Court of the United States

October Term, 1958

TAORMINA CORPORATION, ET AL., *Petitioners*

v.

ANTONIO ESCOBEDO, *Respondent*

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Respondent, Antonio Escobedo, prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied, and in opposition to such Petition, files this, the Respondent's Brief in accordance with Rule 24 of the Supreme Court of the United States.

Statement of the Case

The United States District Court for the Southern District of Texas, Brownsville Division, rendered judgment for the Respondent herein against the Petitioners, A. F. Taormina, E. A. Taormina and Frank Culicchia, and Taormina Company, a partnership, in the sum of $20,000.00 (R. 476).

This is a master-servant case. Escobedo, the Respondent, was an employee of the Taormina Company partnership at the time of his injuries on or about May 17, 1952, and was working as a farm laborer on the Taormina farm south of Donna in Hildalgo County, Texas. The injuries which were the subject of his suit were sustained by him when a gasoline fire occurred while the Respondent was pumping gasoline from a 55-gallon drum into a tractor belonging to the Petitioners, using equipment furnished by the Petitioners (R. 467). The trial Court, hearing the case after a jury was waived, rendered judgment for the Respondent after finding the facts as follows (R. 467-473):

(1) That the Petitioners were negligent and that their negligence proximately caused Respondent's injuries.

(2) That the Respondent was not guilty of any contributory negligence, and that no contributory negligence on his part was a proximate cause of his injuries.

(3) That the Respondent was not barred from recovery by an application of the doctrine of assumed risk.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial Court (254 F. 2d 171), and denied Petitioners' motion for rehearing.

Reply to Petitioners' Contentions Relating to the Question of Limitations

Insofar as the Petition for Writ of Certiorari seeks a review of the action of the Fifth Circuit Court of Appeals on the question of the Texas statute of limitations is concerned, the writ should not be granted because:

(1) Under the laws of Texas, a plea of limitations would not avail the Petitioners, and the Texas Courts would reach the same result as the Fifth Circuit Court of Appeals has reached in the case at bar on this question; therefore, it is immaterial whether or not the doctrine of *Erie Railroad Company v. Tompkins* (304 U.S. 64; 58 Sup. Ct. 817; 82 L. Ed. 1188) controls the filing of amended pleadings where State statutes of limitations are concerned;

(2) The Texas rule on relation-back of amendments (Article 5539-b of the *Revised Civil Statutes of Texas*, quoted on page 5 of the Petitioners' Petition) is substantially the same in its application as Rule 15-c of the *Federal Rules of Civil Procedure* (quoted on page 6 of Petitioners' Petition); and therefore, it is immaterial whether the State rule or the Federal rule is controlling;

(3) Both the Texas Courts and the Federal Courts have arrived at the same conclusion and permit the filing of amendments to correct misnomers or to change the capacity in which a party has been sued without letting in a plea of limitation.

That portion of Petitioners' petition for writ of certiorari dealing with the Texas statute of limitations (Article 5526 of the *Revised Civil Statutes of Texas*) is apparently largely concerned with the supposition that the Texas

rules relating to amendment of pleadings would have given Petitioners a valid plea of limitation, and that there is some conflict between the Federal rules and the Texas rules in this regard. Such is not the case, and the opinion of the Fifth Circuit Court of Appeals is supported by recent holdings of the Texas Court.

The opinion of the Fifth Circuit Court of Appeals correctly sets out the various events leading up to the Petitioners' plea of limitations, and points out, among other things, that after suit had been filed, before the running of the statutes of limitations, against E. A. Taormina, A. F. Taormina and Frank Culicchia, and against Taormina Corporation, a Texas corporation, and Taormina Corporation, a Delaware corporation, that the Petitioners did not disclose the true facts (that the farm was being operated by a family partnership), and

> "disclosure was studiously avoided." (Page 5 of Appendix to Petition for writ of Certiorari).

The Petitioners admit that there is a trend towards liberality in pleading, but then rely upon a series of old Texas authorities in support of their argument to the effect that a Texas Court would have found differently in the present case.

One of the most recent Texas cases on the subject, decided in 1952, is *O'Quinn v. Scott*, (251 S.W. 2d 168, wr. ref. As correctly stated by the Petitioners on page 34 of their Petition, Rule 483 of the *Texas Rules of Civil Procedure* provides that after the date of adoption of such Rule in 1941, the docket notation, "refused", is a determination that the principles of law declared in the

opinion of the Court of Civil Appeals are correctly determined and that the judgment is a correct one). In the *O'Quinn* case, the cause of action had arisen on October 18, 1947. On October 17, 1949, one day prior to the running of the statute of limitations, the plaintiff sued three named individuals alleging that they were partners in a construction business operating under the firm name of W. W. Scott Construction Company, and that the injuries had been sustained as a proximate result of negligence in the construction work. On November 3, 1949, the Defendants filed a joint answer to the original petition denying under oath that they were engaged in the construction business as a partnership under the name of W. W. Scott Construction Company at the times and places mentioned in the plaintiff's petition, or that they were engaged as individuals in such construction work. (This is very similar to the case at bar in which the Fifth Circuit Court of Appeals has found that the true interests were not disclosed and disclosure was studiously avoided). On March 2, 1950, almost six months after the statute of limitations would have run, the appellants filed a First Amended Petition naming W. W. Scott Construction Company, a corporation, as an additional defendant. The plaintiff pleaded in the alternative that if the three individuals named were not partners, then the defendant corporation was responsible for the work, and in the further alternative, that if the corporation no longer existed, then that the three named individuals, as officers, were the liquidating trustees of the corporation. (These allegations are almost identical to the allegations of the Respondent in the case at bar in the second paragraph of his Second Amended Original Petition. R. 39).

The corporation in the *O'Quinn* case filed an answer containing, among other things, a plea of limitations. They moved for summary judgment on affidavits setting out that they were not partners on the date in question, but that the corporation was doing the construction work and had since been dissolved. The motion for summary judgment was granted, and in reversing and remanding the case, the Waco Court of Civil Appeals said:

> "The cause of action alleged in their first amended petition was based upon the same transaction and occurrence set forth in their original petition. The only new or different facts alleged in the amended petition related to whether W. W. Scott Construction Company was a partnership or a corporation at the time when the cause of action declared upon arose . . . Did these new facts or grounds of alleged liability let in a valid plea of limitation on behalf of the dissolved corporation or its trustees in liquidation at the time when the amended petition was filed?
>
> ". . .
>
> "The purpose of the statutes of limitation is not to permit debtors to escape their just obligations but is rather to prevent demands originally invalid or which had been discharged from being enforced after such a lapse of time as would probably make it impossible for defendants to procure the evidence by which a just defense could be established.' (Citing many cases.) Furthermore, *it is generally held that the filing of an amended petition, which merely changes the capacity in which a defendant was originally sued, does not constitute the commencement of a new suit so as to allow limitation to run until the time when the amended petition was filed.* 54 C.J.S., Limitations of Actions, Sec. 275, pg. 308, et seq.; 34 *Am. Jur.*, pg. 225, Sec. 227; 28 *Tex. Jur.*, pg. 207, et seq., Sec. 114.
>
> ". . .

> "Under the circumstances shown by the record before us, we have concluded that the filing of Appellant's amended petition on March 2, 1950, did not let in a valid plea of limitation on behalf of the dissolved corporation or its statutory trustees in liquidation. We think our conclusion is in harmony with the holding of the Supreme Court in the recent case of Hallaway vs. Thompson, Trustee, 148 Tex. 471, 226 S.W. 2d 816." (Emphasis added).

It will be readily seen that the *O'Quinn* case is virtually on all fours with the case at bar, and Petitioners' attempt to distinguish such case in their Petition is without merit. The Fifth Circuit Court of Appeals correctly held that under the authority of the *O'Quinn* case, the Texas Courts would reach the same result in the case at bar. In the *O'Quinn* case, the plaintiff had sued a partnership which turned out to be a dissolved corporation. He was permitted to amend and avoid a plea of limitation on the part of the corporation. In the case at bar, the Respondent originally sued a dissolved corporation which turned out to be a partnership, and the Court permitted Respondent to amend and overruled the partnership's plea of limitation.

The *O'Quinn* case cites the opinion of the Texas Supreme Court in *Hallaway v. Thompson, Trustee* (226 S.W. 2d 816). On page 30 of their Petition, the Petitioners cite this case, and make some erroneous statements which do not appear in the Record as to unreported conversations between counsel and the trial Court in regard to this particular authority. Respondent does not believe that this type of argument has any place in the Petition, but says that *Hallaway v. Thompson, Trustee*, is in point in

the case at bar. This case applies Article 5539-b of the *Revised Civil Statutes of Texas* in exactly the same manner that the Federal Courts apply Federal Rule 15-c. In the *Hallaway* case, the plaintiff sued Guy A. Thompson, Trustee for the St. Louis, Brownsville & Mexico Railway Company, and alleged that he was an employee of that defendant at the time of the injury. Subsequently, after the running of both the 2-year Texas statute of limitations and the Federal 3-year statute (45 U.S.C.A. Sec. 56), the plaintiff amended and sued the defendant trustee in his capacity as Trustee for the San Antonio, Uvalde & Gulf Railroad Company. On page 820 of its opinion, the Texas Supreme Court said:

> "There seems to be no decision construing Article 5539-b on the point presented by this case, and we must therefore pass on its application as an original proposition. The record in this case shows that the same man, Guy A. Thompson, was named as the defendant, and the same transaction or occurrence was alleged as a basis for the suit, in all of the plaintiff's pleadings. The material change as between the original petition and the second amended original petition is that the capacity in which the defendant is sued is changed. . . .
>
> ". . .
>
> "We think that the purpose of the statutes of limitations, as amended by Article 5539-b, would be given proper effect by holding that in the present case, the plaintiff's action was commenced with the filing of his original petition. The defendant, Guy A. Thompson, was then notified of the nature of the plaintiff's claim and the occurrence or transaction out of which it arose. He and his counsel, who have represented him throughout this litigation in whichever capacity he

> was sued, were then given timely opportunity to interview witnesses and to obtain such evidence as they deemed advisable to defend the suit. . . . It was peculiarly within the defendant's knowledge as to whether he was employing the plaintiff as Trustee for one railroad or the other at the time of the injury. . . . Under these conditions, we think it would be a misapplication of the statutes of limitation to hold that the plaintiff's action was barred."

The Texas Supreme Court then proceeded to distinguish many earlier decisions which would seem to hold to the contrary, and in effect, overruled certain old cases which would seem to be in conflict, saying that the obvious purpose of Article 5539-b was to

> "modify the previously existing rule for determining whether limitation should apply to an amended pleading. . . ."

The Petitioners further state in their Petition at page 35 that the holding of the Fifth Circuit Court of Appeals on the matter of limitations is in conflict with other Federal decisions. They then cite a series of cases for

> "the general rule that the statute of limitations continues to run in favor of third parties brought in by amendment as parties-defendant until they are actually made parties."

The key to the fallacy in Petitioners' argument is contained in their use of the expression, "third parties". The many cases which Petitioners cite are cases in which the new defendants brought in after the statute of limitations had

expired were truly "third parties", as opposed to parties to the action before the statute ran.

There is no doubt that as to true third parties or strangers, the statute of limitations is not tolled by the filing of an original petition in which third parties are not named. Such was the case in *West v. Johnson* (129 S.W. 2d 811, wr. ref.), which is heavily relied on by the Petitioners, but which has no application to the facts in the case at bar. In this case (decided before *Hallaway v. Thompson* by the Supreme Court or *O'Quinn v. Scott*), the plaintiff sued one corporation claiming that she had been injured in a parking lot belonging to it. At the time of trial, after the statute of limitations had expired, it developed that the parking lot belonged to an entirely different corporation with a name that was in no way similar to the corporation sued. It also developed that a corporation with a name similar to the one originally sued had once owned the lot, but had conveyed it to still another corporation by a recorded deed some years before the accident occurred. The only connection between the owner of the lot and the corporation which had formerly owned the property was that a man named Berry was the agent of both of them. The Court said that service on Berry would not have the effect to bind other corporations,

> "that Berry may have chanced to represent as an agent, when they were in no way involved in the litigation shown by the process served on him."

This case is not applicable to the facts in the case at bar where all of the Taormina organizations have similar names, are composed of the same people and bear a relationship

to each other that was peculiarly within their own knowledge. The Petitioners do not even question the fact that judgment was properly rendered against the three individuals who were originally sued and served and who were members of the partnership against whom judgment was also ultimately rendered.

In the case of *Gifford v. Wichita Falls & Southern Railway Co.* (224 F. 2d 374), by the Fifth Circuit Court of Appeals, the Wichita Falls & Southern Railroad Company had acquired all of the assets of the Wichita Falls & Southern Railway Company some years prior to the institution of the suit. The Court said that the two corporations were affiliated in a manner known primarily to themselves and their owners. The plaintiff sued the Railway Company by mistake, and only after the case had been once tried out did the defendant divulge, just before the second trial and after the limitation period had run, that the defendant had been misnamed. In deciding the case, the Fifth Circuit Court said that the defendant should not be permitted,

> "just before the second trial begins, to say: 'You are suing the wrong person; you should have sued my Siamese sister,' . . . Where intercorporate relations exist in cases such as this, all such corporations are held to a higher degree of frank disclosure of mistakes such as was made in this case, than is required in other cases where no such close relation exists."

In the case at bar, the interrelation of Taormina Corporation, a Texas corporation, Taormina Corporation, a Delaware corporation, Taormina Company, a partnership, and the various members of the Taormina family can be

seen, by an examination of paragraphs 1 through 4 of Plaintiff's Second Amended Original Complaint (R. 39-45), as well as by the Court's Memorandum on Consolidated Motions (R. 65-74). Certain of the facts are additionally shown in various motions, answers and replies which were omitted from the printed record by the Petitioners in their Designation of the Record with the statement that,

> "The Appellants do not assign any error to the Court's action in regard to these particular defendants";

and,

> "The Appellants are not assigning any error to any action of the Court regarding these corporations". (R. 4, 5)

In the case at bar, as in the *Gifford* case, supra, the Petitioners concealed the relation between them from their uneducated and ignorant employee who only knew that he was employed by "Taormina", and the Fifth Circuit Court of Appeals said:

> "We do not say that the partnership was required to make any disclosures, but it should not be permitted to benefit by not having done so. It was the entity by whom he was employed, against which he had and intended to assert a claim. Those who had the liability had notice of the suit. The Appellee was entitled to the benefits of the rule, the second amendment was properly allowed, and the Appellants were properly made Defendants by the amendment." (Pages 5, 6 of the Appendix to Petitioners' Petition for Writ of Certiorari.)

Reply to Petitioners' Contentions Relating to the Question of Liability

That portion of the Petition for Writ of Certiorari dealing with the questions of negligence, contributory negligence and assumed risk overlooks the most salient aspect of this case in the present state of the record, which is that since a jury was waived, the findings of fact of the trial Court, unless clearly erroneous, could not be set aside by the Fifth Circuit Court of Appeals, and the Fifth Circuit Court of Appeals has specifically found, in its opinion affirming the trial Court judgment, that:

> "We need not enlarge upon the recital of the evidence before the Court. It is enough to say that there was ample evidence to sustain the Court's finding that the Appellants were negligent and that their negligence was the cause of the Appellee's injuries. The evidence justifies the Court's conclusion that there was no contributory negligence of the Appellee which barred recovery." (Page 8 of Appendix to the Petition for Writ of Certiorari.)

The Fifth Circuit Court therefore concurred in the findings of the trial Court and affirmed the same, as they were required to do under Rule 52-a of the *Federal Rules of Civil Procedure* providing, in part, that,

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Both the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have many

times applied Rule 52-a, and have held that findings of fact made by trial Courts without the aid of a jury will not be set aside if the evidence is conflicting. Some Fifth Circuit cases on this point are *Sanders v. Leech* (158 F. 2d 486); *United States v. Hill Lines, Inc.* (175 F. 2d 770), holding the Court's finding of fact that there was no contributory negligence was not "clearly erroneous" and would not, therefore, be set aside; and *Scott v. Gearner* (197 F. 2d 93).

In view of the statement above copied from the opinion of the Fifth Circuit Court of Appeals in the case at bar, there is no merit in the statement at page 42 of the Petition for Writ of Certiorari to the effect that the Court of Appeals did not act on the findings of fact of the trial Court.

Despite the fact that both the trial Court and the Circuit Court of Appeals have concurred in the findings of fact which are determinative of this case, the major portion of the Petition for Writ of Certiorari consists of arguments upon the weight of the evidence. Arguments on the weight of conflicting evidence to support concurring findings of fact by a District Court and a Circuit Court of Appeals are not proper on application for writ of certiorari, it having been many times held by the United States Supreme Court that the Supreme Court is a court of law rather than a court for correction of errors in fact findings, and it cannot undertake to review concurring findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (69 S. Ct. 535, 336 U.S. 271, 93 L. Ed.—).

It has also been many times held by the Supreme Court of the United States, as well as the Supreme Court of Texas, that the issues of negligence and contributory negligence, where reasonable minds can differ, are matters to be resolved by the trier of the facts, (in this instance, since a jury was waived, the trial Court). *Wilkerson v. McCarthy* (69 S. Ct. 413, 336 U.S. 53); *Lang v. Henderson* (147 Tex. 353, 215 S.W. 2d 585).

The only question, therefore, remaining to be determined is whether or not the concurrent findings of fact by the two Courts below are "clearly erroneous" or "show very obvious and exceptional error".

Reducing Petitioners' argument to one sentence, they claim, in effect, that since gasoline is a highly dangerous substance, and since the Respondent was alone at the time of his injuries, and since the Respondent had previously noticed that the hose in question was not clamped with a metal clamp to the gasoline pump, that it must follow, as a matter of law, that the Petitioners were not negligent and that the Respondent was contributorily negligent and assumed the risk of his employment. An examination of the record in the case and the detailed findings of fact by District Judge Allred (R. 467), show clearly that the trial Court's findings of fact on negligence, contributory negligence and assumed risk were well supported in the record. Petitioners would have this Court believe that Respondent was a skilled workman and an experienced mechanic. The trial judge, who had the opportunity to observe this witness and hear his testimony, found:

> " . . . he was hired to hoe beets three or four weeks prior to his injury. He did not speak English and had not completed the third grade in Mexican schools.

He had no technical training other than about three years as a mechanic's helper on automobiles—not tractors—in Mexico." (R. 469).

"He was neither the skilled or experienced mechanic, nor the intelligent person, that defendants picture him. He is little more than the typical wetback laborer common to the border in recent years." (R. 473).

The Petition for Writ of Certiorari recognizes the fact that the undisputed evidence showed that the pump in question, with which Respondent was provided by the Petitioners, was defective in that the hose was not clamped to the pump nozzle. The absence of the metal clamp in question was known to Petitioners' vice-principal and farm foreman for a long time prior to the accident (R. 380, 381, 384, 385, 440, 470). Respondent had never performed the type of work in question alone before the day of the accident (R. 389). The only instructions that were given to him by his employers was to leave the motor of the tractor running at all times while gasoline was being put into it to keep from losing the prime on the pump (R. 386-387).

For the purpose of illumination on the night in question, the Respondent was provided by his employers only with an ordinary, old-fashioned, coal oil lantern with a glass hood (R. 388, 390). All of the equipment in question (with the exception of the lantern) was put in place by Domingo Cavazos, the Petitioner's vice principal (R. 379, 439). At the time of the accident, Respondent was performing his work at around midnight (R. 377) at a location some 440 yards or almost a quarter of a mile from the ranch house (R. 376). He was alone and had not been provided with a helper or fellow employee (R. 378), although the trial Court found, and the evidence supports

the finding, that generally more than one employee was assigned to this particular task (R. 143, 193, 431, 433, 440, 471).

The portions of the Record referred to above clearly show that under the familiar rules in master and servant cases, from the Texas Courts and from practically every other American jurisdiction, support the trial Court's finding that the Petitioners were negligent in various respects:

(1) In providing the employee with defective equipment:

Peck v. Peck by the Texas Supreme Court (87 S.W. 248);
Sternenberg v. Marshall (257 S.W. 2d 312, ref. n.r.e.).

(2) In failing to provide Respondent with a safe place to work:

City of Austin v. Johnson (195 S.W. 2d 222);
City of Denton v. White (179 S.W. 2d 834);
Arnold v. Panhandle & Santa Fe Ry. Co. (77 S. Ct. 840, reversing a decision of the Texas Court of Civil Appeals for the 7th Supreme Judicial District);
Houston Belt & Terminal Railway Co. v. Woods (149 S.W. 372, wr. ref.).

(3) In failing to give the Respondent adequate warnings and instructions:

Johnny Lopez v. Brown Ely. (302 S.W. 2d 957);
Fort Worth & D. Ry. Co. v. Prine (211 F. 2d 697);
Hawkins v. Collier, a case involving the explosion of gasoline and the employer's failure to instruct in its use (235 S.W. 2d 528).

(4) In failing to provide the Respondent with a fellow worker to assist in the operation:

City of Denton v. White (179 S.W. 2d 834, wr. ref. w.m.).

On the question of contributory negligence and assumption of risk, the most important single finding of the trial Court was to the effect that although the Respondent testified that he had noticed that the clamp in question was missing from the pump prior to the accident, that

> " . . . he did not know or appreciate the fact that it endangered his safety before he was injured; . . . (R. 473).

The trial Court further found that an ordinarily prudent person under the same circumstances would not have appreciated the danger, and that the trial Court was

> "certain he did not, and could not, under all the circumstances, appreciate the danger." (R. 473).

These findings are clearly supported in the evidence in that Respondent testified that prior to the time of the accident, he did not know how these pumps were constructed and did not know that there was any danger that this pump was going to come loose (R. 188), and he did not know whether the pump was supposed to have a clamp on it or not (R. 187); that without the clamp on it, the pump worked—"it *pumpted* the gasoline" (R. 185-186), and the hose came off of the connection suddenly, and the gasoline had not been dripping or leaking before it came completely loose (R. 193-194).

Both the Supreme Court of the United States and the Supreme Court of Texas agree that the doctrine of assumed risk is not applicable to risks created by an employer's negligence, and further, that even if an employee observes a defect, it must appear, before he can be said to have assumed the risk, that he knows that the defect is a defect and endangers his safety. *Gila Valley Ry. Co. v. Hall* (232 U.S. 94, 34 S. Ct. 229, 58 L. Ed. 521); *Missouri, K. T. R. Co. v. Barnaby* (167 S.W. 2d 235, ref. w.m.); *Peck v. Peck*, supra; *City of Austin v. Johnson*, supra; *Houston & T.C.P. R. Co. v. Turner* (91 S.W. 562).

If, therefore, the Respondent could not have appreciated the danger or anticipated the injury, and an ordinary prudent person, *under the same circumstances*, could not have done so, it is clear that the Respondent was likewise not guilty of contributory negligence and that no contributory negligence on his part proximately caused his injury, as both the trial Court and the Fifth Circuit Court of Appeals have found.

What, then, of Petitioners' argument that simply because the Respondent happened to be alone at the time of his injuries, and is charged with knowledge of the dangerous nature of gasoline, that he is barred, as a matter of law, from a recovery? This was the exact situation in *Houston Belt & Terminal Railway Co. v. Woods* (149 S.W. 372, wr. ref.), where the employee was provided by his employer with a lantern to use for light in filling one of the employer's engines with oil. He set the lantern down only a few feet away from the pipe through which the oil was running into the engine, and was killed in a resulting explosion, but the Court held that the plaintiff was not contributorily negligent as a matter of law if

he acted as an ordinary prudent person in his situation would have done under the same or similar circumstances; and in *Texas & P. Ry. Co. v. Brown* (168 S.W. 866), it was likewise held that an employee was not contributorily negligent as a matter of law for holding his lantern within 3½ to 4 feet of a fellow employee to give light for the fellow employee to fill his own lantern with oil.

It must be remembered that the lantern in the case at bar could have constituted no hazard in the absence of the splattering of gasoline from the broken pump connection. All of the Taormina employees used the same type of lantern in the same operation without being injured for a long period of time prior to Respondent's injuries (R. 189).

The Petitioners rely heavily on the case of *Nesmith v. Magnolia Petroleum Co.* (82 S.W. 2d 721, no writ history), but this case is not a master and servant case, and the Court specifically held:

> "The doctrine of assumed risk applies only to the relation of master and servant."

Furthermore, in the *Nesmith* case, the pump which was provided by the petroleum company to its customer had no nozzle on the hose, and the hose was too large to be inserted into the gasoline tank without the nozzle. The Court said that the plaintiffs knew how to operate the pump and knew that they were running a risk of spilling gasoline when they used it; they knew that the absence of the nozzle constituted a defect because they had already complained to the petroleum company which had promised to send them a nozzle, but the customer proceeded to use

the defective pump before the nozzle arrived. This case does not reveal a situation in any way comparable to the circumstances in the case at bar.

The Petitioners finally attempt to lift out of context a quotation from the *Nesmith* case to the effect that the pump "was a simple device", and from this language, draw the conclusion that in the case at bar, the "simple tool doctrine" should be applied. The simple tool doctrine applies only to master and servant cases, and as stated before, the *Nesmith* case was not a master-servant suit. Furthermore, the trial Court in the case at bar has specifically found, in regard to the pump in question, that

> "clearly it was defective and constituted more than a simple tool." (R. 470).

Since the trial Court has made this finding, and the same has been concurred in by the Fifth Circuit Court, it is binding upon the Petitioners because in Texas the question of whether or not a tool is a simple tool is considered a question of fact to be determined by the trier of the facts.

In the case of *Pope v. St. Louis, S.W. Ry. Co.* (155 S.W. 1175), the Texas Supreme Court held that even a chisel was not a simple tool as a matter of law, and that the determination of the question should be left to the jury. We also cite *Santa Fe Tie & Lumber Preserving Co. v. Collins* (198 S.W. 164, wr. ref.), in which a jury verdict for plaintiff was affirmed against the contention that a sledge hammer was a simple tool as a matter of law, which the defendant was not required to inspect. In *J. H. W. Steel Co. v. Dover* (170 S.W. 809), the Court cited

the *Pope* case in support of its holding that a pair of tongs was not as a matter of law a simple tool, and in *Henwood v. Neal* (198 S.W. 2d 125), the tool in question was a pick, but the employee-plaintiff was permitted to recovery on a jury verdict finding the employer negligent in failing to inspect.

In addition, the simple tool doctrine is not applicable in the case at bar because such doctrine only operates to relieve a master of the duty to inspect certain simple tools which have been committed to the custody of a servant who has the capacity to understand its character and uses. *Gulf C. & S.F. R. Co. v. H. Larkin* (98 Tex. 225, 82 S.W. 1026, 1 L.R.A. (N.S.) 944, reversing 80 S.W. 94). In the case at bar, the trial Court did not find the Petitioners guilty of any negligence for failure to inspect, but, on the contrary, found that the defects in question were known to the Petitioners' vice principal Cavazos and had been for a long time (R. 470).

Conclusion

Respondent respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because the trial Court and the Fifth Circuit Court of Appeals have correctly held that judgment should have been rendered against all of the Petitioners herein, and the holding of such Courts is in conformity with both the Texas rules and the Federal rules relating to amendments of pleadings; and the trial Court and the Fifth Circuit Court of Appeals have concurred in findings of fact which are not clearly erroneous but which are supported by the

evidence, and such findings of fact establish liability on the part of the Petitioners and should not now be reviewed.

Respectfully submitted,

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Certificate of Service

The State of Texas :

County of Cameron :

I, LEONA HAND, upon oath state that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was by me on the 14th day of AUGUST, 1958, personally deposited in the United States Post Office at Harlingen, Texas, with first class postage prepaid, addressed to Mr. Jackson Littleton, Kelley, Looney, McLean & Littleton, Attorneys at Law, Edinburg, Texas, and to Strickland, Wilkins, Hall & Mills, Attorneys at Law, Mission, Texas, all attorneys for the Petitioners; and I further certify that

airmail postage was not required because the attorneys in question reside less than 500 miles from Harlingen, Texas.

Leona Hand

Subscribed and sworn to before me by the said LEONA HAND on this 14th day of AUGUST, 1958.

Mary Wark

Notary Public in and for Cameron County, Texas. (My commission expires June 1, 1959, and I am authorized under the laws of Texas to administer oaths).